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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 174.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. BAY AND WILLIAM BAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED FEBRUARY 1, 1905.

(19,624.)

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a Supreme Court of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
No. 8708.

Record.

Stephens & Lincoln, Julius Anderson, for plaintiff in error.
Lawrence Maxwell, Jr., J. O. Yates, for defendants in error.
Filed Jan. 5, 1904 in supreme court of Ohio.
L. E. EMERSON, Clerk.

1 Supreme Court of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
No. 8708.

Record.

STATE OF OHIO, Lawrence County.

Court of Common Pleas.

GEORGE W. BAY and WILLIAM BAY, Plaintiffs,
vs.
THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET Company, Defendant.

Petition.

Filed April 7th, 1900.

The defendant is, and at the times hereinafter mentioned was, a corporation organized under the laws of the State of Ohio as
2 a river transportation company, engaged in running steamboats on the Ohio river for the carriage of freight and passengers between Cincinnati, Ohio, and Syracuse, Ohio.

In November, 1895, the Portsmouth and Pomeroy Packet Company, a corporation organized under the laws of the State of Kentucky, was, and for some years prior thereto had been in business as a river transportation company, running the steamboats Henry M. Stanley and Lizzie Bay for the carriage of freight and

passengers between Cincinnati, Ohio, and Pittsburg, Pennsylvania, by way of Charleston, West Virginia. The plaintiff, William Bay, was superintendent and treasurer of said steamboat line, and the plaintiff, George W. Bay, was the president of said line. Both of the plaintiffs had been engaged for many years in the steamboat business on said route, and had a large acquaintance and good will, and were owners of stock in said Portsmouth and Pomeroy Packet Company.

On November 26, 1895, the plaintiffs and said Portsmouth and Pomeroy Packet Company entered into a written contract with the defendant, whereby said Portsmouth and Pomeroy Packet Company and said George W. Bay and William Bay sold and transferred to the defendant said steamboats Henry M. Stanley and Lizzie Bay, with all the tackle, apparel and furniture of each of them; also two deck barges, Lizzie at Ironton, and Stella at Cincinnati, and two coal flats, one at Greenup, Kentucky, and the other in the Kanawha river; all of which property belonged to said Portsmouth and Pomeroy Packet Company; also $500 in the stock of the Coney Island Wharf Boat Company, which belonged to said William Bay, in consideration of the sum of thirty thousand five hundred dollars ($30,500), which the defendant paid therefor.

Said Portsmouth and Pomeroy Packet Company and said George W. and said William Bay agreed with the defendant that
3 neither of them would for a term of five years from the date of said sale and transfer be in any way, directly or indirectly, engaged in running or operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth to or for points below Portsmouth, Ohio. In consideration whereof, the defendant, in addition to said purchase price of $30,500, agreed to pay to the plaintiff the sum of $3,600 annually, in advance, for five years from the time of said sale and transfer of said boats and property to the defendant, to-wit, November 26, 1895. The defendant has paid to the plaintiffs four of said annual payments of $3,600 each, but it has failed and refused to pay to the plaintiffs the annual installment of $3,600 due on November 26, 1899. The plaintiffs and said Portsmouth and Pomeroy Packet Company have duly kept and performed their said contract and all the conditions imposed upon them thereby.

Plaintiffs pray for judgment against the defendant for said sum of three thousand six hundred dollars, with interest from November 26, 1899, for their costs and all other relief to which they may be entitled.

MAXWELL & RAMSEY,
J. O. YATES,
Attorneys for Plaintiffs.

Duly verified.

Answer and Cross Petition.

Filed May 31, 1900.

Now comes the defendant, and for answer to the petition says that it admits that it is a corporation organized under the laws of
4 the State of Ohio, as a river transportation company, as alleged in the petition, and it admits that the Portsmouth and Pomeroy Packet Company was a corporation in November, 1895, organized under the laws of the State of Kentucky, as alleged in the petition, and was then the owner of the Henry M. Stanley and Lizzie Bay. It admits that on the 25th day of November, 1895, it entered into a written contract with the Portsmouth and Pomeroy Packet Co. and George W. and William Bay, which contract contained the terms and stipulations set forth in said petition, but said petition does not contain all of the stipulations contained in said contract. And defendant denies each and every other allegation contained in said petition not herein expressly admitted.

2. And for further answer this defendant says that the agreement set out in plaintiffs' petition contained the following stipulations, to-wit: that in case of opposition to the boats of party of the second part by other boats running from Cincinnati, O., to Portsmouth, O., or from Cincinnati to points above Portsmouth, not including points above Syracuse, O., causing the party of the second part to carry freight and passengers at exceedingly low rates, such as tobacco at twenty-five (25) cents per hogshead, cattle at fifty (50) cents per head, hogs at ten (10) cents per head, sheep at five (5) cents per head, and other articles of freight in said proportion, the time of payment of said yearly instalments of thirty-six hundred ($3,600) dollars should be deferred during the period of such opposition and until the same has ceased, when said payments shall be made and be resumed so that the parties of the first part shall ultimately receive the full amount due on said annual payments of five years.

Defendant further says that on or about the 17th day of March, 1899, opposition to the boats of this defendant by other boats run-
ning from Cincinnati, Ohio, to Portsmouth, and from Cin-
5 cinnati to points above Portsmouth, not including points above Syracuse, Ohio, did commence and intervene as against the boats of this defendant, causing this defendant to carry freight and passengers at the exceedingly low rate set forth in said contract, and other articles of freight in said proportion; that by reason of the provision of said contract there is no amount now due from the defendant to the plaintiffs.

3. And by way of cross-petition or counter-claim this defendant says that one instalment of thirty-six hundred ($3,600) dollars was paid by it to the plaintiffs on or about the 26th day of November, 1898; that at said time no opposition had appeared, but that subsequently, on or about the 17th day of March, 1899, said opposition

hereinbefore alleged took place and has ever since continued, and that by reason thereof this defendant has already overpaid to the said plaintiffs more than the amount due it under said contract, to-wit, the sum of thirty-six hundred ($3,600) dollars; that the consideration for which said $3,600 was paid the plaintiff- by the defendant on the 26th day of November, 1898, has entirely failed, and that defendant is entitled to a return of said sum of money, to-wit, the sum of $3,600.

Wherefore it prays judgment on its said counter-claim against said plaintiff- for the sum of $3,600 and interest.

STEPHENS & LINCOLN,
JULIUS L. ANDERSON,
Attorneys for Defendant.

Duly verified.

Reply and Answer to Cross Petition.

Filed May 9, 1900.

The plaintiffs admit that the agreement set out in their petition contained the stipulation alleged in the second paragraph of
6 the answer. They deny each and every other allegation contained in the second paragraph of the answer.

Answer to Cross Petition.

Plaintiffs admit that the defendant paid to them said instalment of $3,600, on or about November 26, 1898, and at that time no opposition had appeared.

They deny each and every other allegation contained in the cross-petition.

MAXWELL & RAMSEY,
J. O. YATES,
Attorneys for Plaintiffs.

Duly verified.

Journal Entries.

April Term, To-wit, June 14th, A. D. 1901, Journal 29, p. 261.

This cause came on to be heard at a former day of this term, and a jury being waived, was submitted to the court upon the pleadings and the evidence and the arguments of counsel. On consideration whereof the court found that there was due to the plaintiffs from the defendant the sum of three thousand eight hundred and twenty-nine dollars and eighty cents ($3,829.80), with interest from the first day of this term, to-wit, April 30, 1901, and the defendant having filed a motion for new trial, and the same being overruled, it is now con-

sidered that the plaintiffs recover from the defendant said sum of $3,829.80, with interest from April 30, 1901, and their costs. To all of which the defendant excepts, and it is ordered that the journal be kept open for fifty days for the allowance, signing and filing a bill of exceptions herein.

7 And now this 28th day of June, 1901, came the defendant and presented its bill of exception herein to this court of common pleas of Lawrence county, Ohio, which after careful examination the court finds to be correct in all respects, and said court doth allow and sign the same, and same is filed herein, and it is ordered that same be and hereby is made a part of the record in this cause, but not spread at length upon the record.

Motion for New Trial.

Filed June 10, 1900.

Now comes the defendant and moves the court to set aside the facts, all and singular, found by the court, and to arrest judgment herein, and for a new trial herein, for the following reasons, to-wit:

1. Said facts found, all and singular, are not sustained by sufficient evidence, and are against the manifest weight of the evidence, and against the law.
2. The court erred in rejecting evidence offered by the defendant.
3. The court erred in receiving evidence objected to by defendant.
4. Said facts found and the judgment in this case should be in favor of defendant and against plaintiffs.
5. Said finding of the amount due plaintiffs, and the judgment are excessive.

STEPHENS & LINCOLN,
JULIUS L. ANDERSON,
Attorneys for Defendant.

8 ## Bill of Exceptions.

Filed June 28, 1901.

Be it remembered that on the trial of this action, at the April term, 1901, of the court of common pleas of Lawrence county, Ohio, Honorable John C. Milner, judge presiding, a jury having been waived, the plaintiff-, to maintain the issues on their part to be maintained, called and had sworn:

WILLIAM BAY, who being duly sworn, testified as follows:

By Mr. MAXWELL:

Q. Captain, you are the William Bay mentioned in this contract?
A. Yes, sir.
Q. And your brother is George W. Bay?

A. Yes, sir.
Q. Have you the contract?
A. Yes, sir.

By Mr. MAXWELL: We offer the contract in this connection, which is hereto attached, marked "Exhibit T," and made part hereof.

Q. Now, what had been your business prior to the date of this contract, Captain?
A. Steamboating; went to work at that in the winter of '63 and '64, and have been steamboating ever since that time continually.
Q. On what route?
A. All the way from Pittsburg to Cincinnati, and from Cincinnati to Louisville; have been some below Cincinnati and in the Kanawha river, too.
Q. In what capacity have you engaged in steamboating?
A. Owner and master and clerk and pilot.
Q. During all these years you have been running on the river?
9 A. Yes, sir.
Q. What connection did you have with the Pomeroy and Portsmouth Packet Company?
A. I was superintendent and treasurer of that company, and part owner; we had boats that were not owned by that company, but I was treasurer and superintendent of the Pomeroy and Portsmouth Packet Company.

By the COURT:

Q. I thought that this plant that you sold out to the defendant was the plant of the Pomeroy and Portsmouth Packet Company?
A. Yes, sir; it was.
Q. And that you and your brother owned that?
A. We owned a large amount of the stock, and we had a boat that he and I were running from Pomeroy to Cincinnati, the steamer Ruth, and the packet company owned the boat running from Charleston to Cincinnati.
Q. At the time you entered into this contract you and your brother owned the Ruth also?
A. Yes, sir.
Q. Running between Pomeroy and Cincinnati?
A. Yes, sir.
Q. What became of that boat?
A. We took her—at that time the river was very low and we only had one boat running, the Lizzie Bay, that belonged to the packet company; she was in the Stanley's place, and we operated the Lizzie Bay from Pomeroy to Cincinnati, or wherever we could make the run, and we were running her at that time; the Ruth was laid up on account of the low water, and after we made this contract we put the Ruth from Charleston to Pittsburg.

Q. Since the date of this contract have you engaged at all in running any boats except the Ruth between Pittsburg and the points you have named?

10 A. We have the Ruth now in the Wheeling trade.

Q. So that the contract involved your taking the Ruth out of the route you had established betwen Portsmouth and Cincinnati?

A. She was running three trips a week.

By the COURT:

Q. You took all your boats out of this route?

A. Yes, sir; we had the Chevalier running from Portsmouth to Proctorville; we continued that.

Q. And now, what runs were the Stanley and Lizzie Bay making?

A. The Henry M. Stanley was running weekly from Charleston to Cincinnati; she went up the river twenty-five miles beyond Charleston, and from there to Cincinnati; and the Ruth was running tri-weekly from Portsmouth to Cincinnati.

Q. And the Lizzie Bay?

A. The Lizzie Bay had made the second trip probably after the low water; the river had been very low and it raised a little and she made two or three trips at the time this contract was made, and she would go up as high as Huntington; I think we run her between Huntington and Gallipolis.

Q. That was from Cincinnati?

A. Yes sir; we were changing continually at that time; the Ruth was laying here.

Q. Except during that stage of low water what run had the Lizzie Bay?

A. From Charleston to Pittsburg.

Q. Then you had one boat regularly between Cincinnati and Charleston, and points above in the Kanawha river?

A. Yes, sir.

Q. And one from Charleston to Pittsburg?

A. Yes, sir.

Q. So that these boats, connecting, made the run from Cincinnati to Pittsburg and return?

11 A. Except in low water; our purpose was to run boats from Charleston to Cincinnati and from Pittsburg to Cincinnati, and from Portsmouth to Proctorville.

Q. What boat was the Portsmouth and Big Sandy Company running?

A. They hadn't started their boats out after the low water, they had no boat that I remember of up to that time that I remember of.

Q. Prior to that?

A. They were running three boats to Pomeroy.

Q. Between Cincinnati and Pomeroy?

A. Yes, sir; Cincinnati, Pomeroy and Syracuse; that is seven miles above Pomeroy; of course, they had boats running to Louisville and Memphis.

Q. They were running to points below Cincinnati?

A. Yes, sir.

Q. How many of these instalments have been paid to you, Captain?

A. Four; they had a boat to Maysville and three boats to Pomeroy, I think that is all they were doing above Cincinnati at that time.

Q. Well, what trade did those to Pomeroy carry?

A. Well, there was stock and general merchandise and passengers, there was freight and passengers, and each made two trips a week.

Q. How did they run in order to catch the trade at Ironton, for instance?

A. Their boats came down along in the afternoon up to midnight. They had a boat down ahead of us on Monday morning; we left Charleston Sunday morning and struck the trade below Portsmouth before morning, and we left there in the morning, and we went down through that country there in daylight and struck that trade in daylight, because we didn't like to depend on the night trade, and the boats would be pretty heavily loaded.

12 Q. So you ran your boat down to reach Portsmouth near morning?

A. Yes, sir; and we generally done a good deal of business in there.

Q. Then you readily accommodated the Ironton trade and the Portsmouth trade?

A. We come along here from nine or ten o'clock until midnight, and we would run on down to Portsmouth and while away the time there until daylight, and left there in the morning.

Q. What time did the boats of the Big Sandy Packet Company get here?

A. They just went along ahead of us; on other days they would sometimes be behind time leaving here, sometimes as late as midnight; they had a boat in there between Portsmouth and Cincinnati to establish their trade through there away back as late as in the '30's or '40's, and they had a trade established; but they had taken their boat out and then we put the Ruth in.

Q. Did these boats that you run from Charleston accommodate the Portsmouth trade also?

A. Yes, sir; we done a lot of business at Portsmouth.

Q. From Portsmouth down?

A. Below Portsmouth going down, and we got considerable business there for the Kanawha trade going up.

Q. What where the freight rates at the time of this contract?

A. Well, we carried some freight as low as six cents a hundred, and some at five cents a hundred; we carried five tons sometimes

for a dollar a ton, and on dry goods we tried to get from eight to ten cents a hundred; we had no regular rate, we had to cut when we found what the other boats were doing.

Q. I don't want you to go into that yet; you would get from six to eight cents a hundred on merchandise?

13 A. Yes, sir, generally; and we carried pig iron as low as fifty cents a ton; we carried hogs as low as fifteen cents, and we would carry cattle as low as seventy-five cents, small cattle, and we would charge as high as a dollar and a half on cattle; we charged a dollar and a half from the Kanawha river, and carried calves at twenty-five cents right along all the time; the regular rate, I believe, was fifty cents.

Q. Did the distance make any difference in the rate?

Q. Yes, sir; on tobacco out of the Kanawha river——

Q. From Portsmouth?

A. Well, from Portsmouth about a dollar, and seventy-five below Portsmouth; at Riverton there is quite a shipping point for tobacco.

Q. Any sheep?

A. I believe we carried some lambs at ten cents; we tried to get twenty and fifteen, but usually got ten cents; the same on hogs, fifteen to twenty-five cents on hogs; it was owing to the distance; from the Kanawha river we got twenty-five cents, and along about Gallipolis twenty-five cents, and at Manchester or Maysville we took them as low as fifteen cents; it was sort of a rate that we fixed when they cut on us.

Q. I am inquiring about the regular rates that were charged at the time this contract was entered into.

A. The rate varied, according to distance, from fifteen to twenty-five cents on hogs, and from twenty-five to a dollar and a half on tobacco, and from seventy-five cents to a dollar and a half on cattle; for instance, at Augusta there were large tobacco shipments and we got down to a net price of twenty-five cents on tobacco.

By the COURT: What was the rate on hogs?

A. From fifteen to twenty-five cents on hogs, sometimes when a man would ship big hogs we would charge him thirty cents.

By the COURT: And from ten to twenty-five cents on sheep?

14 A. Yes, sir.

By the COURT: Did that depend upon the size and weight?

A. Yes, sir.

By the COURT: And on the distance; you didn't charge as much from Portsmouth to Cincinnati as you did from Ironton to Cincinnati, did you?

A. We charged about the same.

By the COURT: A short distance made no difference?

A. No, sir; about six cents to Portsmouth, eight to Gallipolis and ten to the Kanawha river; we carried freight to Charleston for fifteen, and some big heavy goods we carried sometimes as low as eight cents to Charleston; about the lowest we carried was six cents to Portsmouth, eight to Gallipolis, and ten to Charleston.

Q. That was for general merchandise, six, eight and ten cents?

A. Yes, sir.

By the COURT: Where was ten cents to?

A. Above Gallipolis to Charleston; the rates were lower after we started in there.

Q. Those were the rates that were in existence at the time that you sold out to the Big Sandy Packet Company?

A. Yes, sir.

Q. And they were the rates that had been established through competition between you and the Big Sandy Packet Company?

A. Yes, sir; we didn't know what day they were going to change the rate; it was a hot time, and if we could get a pretty good load without cutting we didn't cut; we could hold about the rates I have mentioned and get business.

15 Q. Were those the rates that you actually charged at that time?

A. Yes, sir.

Q. Were those the sates that you actually charged at that except you and the Big Sandy Packet Company?

A. There were other boats running, but they didn't take business below Syracuse, that is what this clause, "points above Syracuse," wasn't mentioned, and also that boats should run to Portsmouth because there were boats operated below Portsmouth that didn't belong to the White Collar line; Edgington had some boats and the Pittsburg line run regularly from Pittsburg to Cincinnati, though they didn't cut with the White Collar line on rates; there was no competition there.

Q. The White Collar line is the name that the Big Sandy Packet Company is generally known by?

A. Yes, sir.

Q. This last instalment has not been paid to you?

A. No, sir.

Q. The other four were paid?

A. Yes, sir; they have been paid.

Q. After you took the Ruth out of her run between Portsmouth and Cincinnati, did the Big Sandy Packet Company put in any boat there?

A. No, sir.

Q. Was there any boat running to take the place of the Ruth?

A. No boat run there until the Avalon came down from Charleston, and after while the Edgingtons extended their line from Portsmouth to Cincinnati; had a boat for a while on each day.

By the COURT: What packet line is running now besides the Big Sandy on this route that you sold to them?

16 A. There are the boats of the Pittsburg line and the Urania from here to Cincinnati.

Q. How often does that line run a boat per week, once or twice?

A. Pittsburg line had a boat down every day.

Q. How often does the other line?

A. Tri-weekly.
Q. Who does the Urania belong to?
A. To the Bay family; my son, William J. Bay, owns her.
Q. You are not interested in her?
A. No, sir.

Cross-examination by Mr. ANDERSON:

Q. Mr. Bay, when did your son become the owner of the Urania?
A. Now, I don't know that I can exactly tell you that, but I believe it was in April sometime, or May, 1899, I believe; the same year that Captain Laidley had her chartered.
By the COURT: Was the Urania running on that same route when he got it?
A. She was running there when these boats were.
Q. You gave her to your boy?
A. No, sir.
Q. She was running in opposition to these other boats?
A. No, sir; Captain Laidley was operating her himself.
Q. When you spoke about that you didn't know one day what your rates would be the next day, why was that?
A. I will tell you why that was; we would go along the river and a man would have a lot of hogs, and the wharfboats were against us; specially at Manchester the wharfmaster was against us, and we would have to have him buy the freight; the man would ask what we charged for hogs; if we said twenty cents, he would say I
17 will give you fifteen cents to take these hogs; sometimes we took them and sometimes we didn't; that was exactly the situation.
Q. In other words, there was opposition and you had to fix your rates below them in order to get the freight?
A. Sometimes.
Q. Isn't that the reason, that you were running opposition and you had to fix your rates in order to get the freight?
A. No, sir; we weren't running in opposition.
Q. There was opposition, and that wouldn't have been the case if there hadn't been opposition, would it?
A. Well, we would charge twenty cents for each hog.
Q. That was because the Big Sandy Company was running boats in the same trade?
A. Yes, sir.
Q. In fact where there is opposition, what effect does it have upon the freight rates?
A. Of course, a man can establish rates and has to cut them down, perhaps.
By the COURT: Opposition tends to lower the rate?
A. Yes, sir.
Q. Does it lower it uniformly or do you sometimes get a higher rate than at others?

A. We would get down there with a light trip and feel a little angry.

Q. I asked you does it lower the rate uniformly, or do you take whatever rate you can get, whether sometimes more than at others?

A. Down to a certain rate; if we thought we couldn't get enough to pay for handling freight, we wouldn't take it.

Q. That is when you would get the lowest?

A. No, sir.

Q. Isn't that true, unless you would reach such a point as that it would be a losing rate?

A. Suppose we were pretty well loaded, we could afford to
18 carry it at ten cents a hog, if we had room on the boat for them.

Q. I thought you said a while ago that you carried hogs for ten cents apiece?

A. If we had a boat pretty well loaded and had good chances for freight below we refused hogs at fifteen cents.

Q. Isn't it true that opposition compels an irregular cut of freight rates until you reach the point where it would be a loss?

A. Competition, of course, reduces them.

Q. Does it gauge them uniformly or do you carry at any price when you can't get it at any other at a less rate than your cut?

A. No, I wouldn't say that we did.

By the COURT: When there was no opposition, you say that the price on hogs was twenty cents; now, if opposition struck in, would you make a uniform rate all along?

A. Oh, no.

Q. You would charge twenty cents where you could get it?

A. Yes, sir, we would charge twenty cents where we could get it.

Q. And less where you had to in order to get them?

A. Yes, sir, down to fifteen.

Q. There was a point below which you wouldn't go?

A. We had to do it because we had to see that the other line didn't get it; it wasn't a matter of business altogether. There was some feeling in the matter.

Q. Isn't that the way your freight rates were effected at the time these parties bought your boats out?

A. Yes, sir; they were cutting on us.

Q. Now, then, isn't it also a fact that it would effect freight rate in any case of opposition that you ever had anything to do with, or knew anything about?

A. Yes, sir; we have had an established rate for passengers for twenty miles travel.

19 Q. But when you are cutting freight rates the rates are effected just as I suggest?

A. We refused freight sometimes at the regular price.

Q. Isn't every case of opposition that you ever knew about or had any knowledge of, didn't it effect the freight rates as I have suggested?

A. Of course, it does.

Q. You know it is competition?

A. Yes, sir.

Q. Isn't it a fact, Captain, about March, I believe you have admitted in your answer that there did opposition spring up about March, 1899?

A. No, sir, I call it a boat going in there to fill the necessities of the people.

Q. Isn't it a fact that the Big Sandy Packet Company had a boat going from Portsmouth to Cincinnati each day?

A. I don't know.

Q. Did you ever know of a time when there wasn't boat going down every day for the last twenty-five or thirty years?

A. I have known there was a mighty kick about it.

By the COURT: Do you know?

A. Oh, no, I didn't pay much attention to that.

Q. Haven't they been running boats every day, except Sundays, and sometimes on Sundays, every day when the river was navigable?

A. I have noticed that they didn't run one; I have seen men standing on the shore waiting for hours for a boat.

Q. Was that the case at any time when there was no opposition?

A. Yes, sir, at several times during all the period of time there was none and when there was.

Q. At what time?

A. Well, they had no boat down on Mondays sometimes, and sometimes they did.

Q. I am talking about when there was no opposition?

20 A. They went down on Sundays and come back on Mondays then.

Q. Did they get down in front of the other boat?

A. Yes, sir.

Q. Wasn't that the way of it when you were running in opposition to them?

A. Yes, sir; they had a boat in front of us all the time.

Q. Was there enough trade in that trade to be profitable for two boats going down at the same time?

A. Yes, sir; we made money. I don't know what they did.

Q. If you were making money, why did you sell out?

A. We weren't making as much as we thought we ought to, and we thought——

Q. When you referred to opposition in your contract, were you referring to some opposition that had been between you and this company?

(Objected to by Mr. Maxwell; objections sustained, exceptions.)

Q. From what point did you carry the cheap tobacco?

A. From only one point.

Q. What point was that?

A. We carried tobacco, I think, at twenty-five cents net; we had to pay a man ten cents to get it for us, as the White Collar line controlled the wharfboat and we couldn't receive any freight from it, so I had to constitute an agency at Augusta. We generally took on a hundred or a hundred and twenty-five or fifty hogsheads at that point; the wharfboat charge us for laying on there and with what we paid the man it made us carry it at fifty cents a hogshead, and that is the lowest we carried tobacco.

Q. Captain, in the competition that you say existed between your boats and the different companies prior to the selling out referred to in the contract, wasn't that about as hot competition as you could make it?

21 A. Well, as I told you, they carried a good deal of stuff pretty low, and——

Q. Wasn't the competition about as hot as you could make it?

A. It was on up days; on other days they charged about the usual rates.

Q. That was the case during all the period of this competition that has been going on since March, 1899?

(Objected to by Mr. Maxwell.)

By the COURT: The burden is on the defendant to show that this competition has been going on since March, 1899.

Q. Wasn't the competition about as hot since the selling out as it could be?

A. Between the Avalon and the Edgington boats?

Q. Yes, sir.

A. I tried to keep track of the boats that were running, outside of their boats. I tried to find out as to what they were charging, to see whether they got out of this contract price or not; I wasn't paying much attention to it.

Q. It was this part of going down to it?

A. That was my construction of it, my general construction.

Q. Now, then, do you know what boats have been competing with this company since this contract was made?

A. What boats since the contract?

Q. Yes, sir.

A. I believe I do.

Q. And in what point of the line?

A. Yes, sir.

Q. Name them, please.

A. The Avalon started in about March 19, 1899, and she run until in May sometime, when she broke a shaft.

Q. Who was on that boat?

A. Captain Kramer, of Parkersburg.

22 By the COURT: Where did that run?

A. From Charleston to Cincinnati.

Q. She run a little over two weeks?

A. She run and continued to run off and on a while, and then quit on account of the low water, and then she got to working again, and broke a shaft again, and then come out to finish her run and made a few trips and quit for good.

By the COURT: That was from March to May, 1899?

A. Yes, sir; and Edgington's commenced sometime during the fall and run during all the low water and up to the next summer sometime.

Q. Were there *are* any other boats other than the Edgington line?

A. No, sir; just the Pearce and the Wells.

Q. From what point did they run?

A. They have been running from Augusta to Portsmouth and Vanceburgh, and then they extended their run to Cincinnati awhile, and then about the last of the year they quit and commenced running up to Buena Vista and Manchester.

Q. They run up that far?

A. Yes, but didn't come through to Portsmouth.

Q. Are they still running?

A. I think not; I think Captain Laidley made some compromise with them.

Q. How long ago?

A. I don't know, something over a month ago.

Q. Well, now, what boats are running up in competition with them?

A. Well, the Urania is running from here to Cincinnati.

Q. Who owns her?

A. My son.

Q. Is your son on her?

A. No, sir.

Q. Who manages her?

23 A. Captain Johnson.

Q. Who employs Captain Johnson?

A. My son hired him to go on her.

Q. Who gives him his directions?

A. He knows that himself; there may be some suggestions made.

Q. Do you direct him?

A. I suggest things, sometimes.

Q. You do it generally?

A. In the interest of my son.

Q. You are your son's agent?

A. No, sir; just as a matter of seeing the business get along.

Q. Suppose you would send him a telegram to turn that boat around half way between here and Cincinnati, would he do so?

A. No, sir; I don't think he would.

Q. Didn't you offer to sell that boat not long since?

A. I did before she started in there; she was offered for sale at Pittsburgh by an agent; it was rather put into his hands for sale.

Q. Who put her in his hands?
A. Well, I talked to him.
Q. Who built the boat, Captain?
A. Me and my brother.
Q. Whose money paid for her?
A. Mine.
Q. When the defendant was running in opposition to the Avalon, was she chartered to the defendant?
A. Chartered to the White Collar line.
Q. Who owned her then?
A. I believe when she was chartered, I owned her.
Q. Who gets the profits that boat makes, if she makes any?

(Objected to by Mr. Maxwell; objection sustained.)

24–57 By Mr. MAXWELL: This Urania that they have been talking about, when did she go into this trade?
A. About the middle of this last February, and the Edgington boats quit the last of December.
By Mr. ANDERSON: During the period of time covered by since when this contract was made up to the beginning of this suit, Captain, when you took freight above points at Syracuse, where did it go to?
A. When we took freight?
Q. Between Syracuse and Portsmouth, where was its destination?
A. I don't know what freight you refer to.
Q. Any freight.
A. We took freight from Portsmouth for a while up to as far as our boat ran.
Q. Suppose you took freight at Marietta, where was its destination when you were coming down the river?
A. Going to Portsmouth?
Q. Yes, sir.
A. Sometimes when we were running above there we took a little freight that goes to Cincinnati.
Q. How did you get it down there?
A. Put it on whatever would take it. Captain Laidley's boats would have taken it anywhere; we never took anything from above Syracuse.
Q. Did you take anything between Syracuse and Portsmouth that went below Cincinnati or below Portsmouth?
A. Never that I know of.

* * * * * * *

58 Captain MARTIN, who being duly sworn, testified as follows:

By Mr. ANDERSON:

Q. Captain, how old are you?
A. Fifty-six.
Q. How long have you been in business and what business?
A. Steamboating for about thirty years.
Q. What rivers and where?
A. On the upper Mississippi and have been here since '71.
Q. Running from what points?
A. Between Cincinnati and Pittsburg.
Q. Did you know of the opposition between the Bay Brothers and the defendant in this case?
A. Yes, sir.
Q. Do you know what effect it had, if any, upon tariff rates between the two parties on the day of the opposition?
A. It had considerable effect.
Q. State what it was and how it affected the rates?

Objected to by Mr. Maxwell.

By Mr. ANDERSON: We want to show the conditions at the time the contract was entered into.
Q. How did it affect the rates?
A. It affected them to a great extent.
Q. Did it affect them uniformly or otherwise?
A. Certainly not; some things we got the regular rates for and some half the rate and some things not a quarter of the regular rates.
Q. Now did that continue on during the period of contest between the Bays and the defendant.
A. Yes, sir.
Q. You are running between Cincinnati and what point since the Bays sold out?

59 A. Cincinnati and Pomeroy.
Q. And have you been on any of the boats that were running on the days of the opposition?
A. Yes, sir.
Q. What boats?
A. I was on the Urania when the Avalon came in.
Q. How did that affect the rates?
A. About the same as prior to the selling out.
Q. Did that affect them uniformly or just as you stated before?
A. Just as we stated before; we tried to get all out of it we could.
Q. And when you could you got passengers and freight at the best rates you could?
A. Yes, sir.

Q. Do you know of any shipments of tobacco at as low rate as twenty-five cents?

A. I can't call any to mind between those two dates that was directly at twenty-five cents.

Q. What per cent., could you give an opinion, as to what per cent of the freight that was carried below the regular tariff rates, between those dates?

A. Well, I couldn't estimate them very well just now.

Q. You can give your opinion about it; do you know whether it was a large or small per cent.?

A. It affected our rates to a very great extent; I can say that truly.

Q. Did you carry half or more at less than the regular rate?

A. I should say we carried half the freight below Portsmouth at less than the regular rates.

Q. State whether the defendant company sent any boat down on the days of the week; if so, what days during that period?

60 A. We left Pomeroy Saturday morning, and come down as far as Portsmouth, and left there on Monday morning and got into Cincinnati Monday night.

Q. State whether any boat of that company went down on any other days of the week.

A. Yes, sir.

Q. What other days?

A. All other days except Saturday night.

Q. Was that uniform whenever the river was navigable?

A. Yes, sir.

Q. How did this opposition or competition affect the passenger rates?

A. Well, it affected the passenger rates to a certain extent, of course; we carried more people below Portsmouth on Mondays than we did on other days in the week, and we got very little money out of it.

Q. How did it affect the earning capacity of boats with reference to profit or loss?

A. Well, it affected them to the extent that we commenced to lose money after the opposition commenced, and before that we had been making money; that is the difference.

Q. How long did you continue to lose money?

A. With a few exceptions we lost nearly all the time between those two dates.

Q. Can you state in round numbers about how much per week?

A. No; I wouldn't like to state that, because I only looked at the statement when the clerk made it out.

Q. Could you give us some idea?

A. Well, no; I couldn't.

Q. What boat were you on?

A. On the Urania.

Q. Were you on any of the other boats during this opposition?

A. Yes, sir; on the Nesbit, the Sunshine and the Lizzie Bay.

61 Q. In what capacity?

A. I was master.

Q. Now was the same thing true with the other boats?

A. Yes, sir; the same conditions prevailed.

Q. Do you know anything about carrying cattle at fifty cents a head and hogs at ten cents, and sheep at five cents, etc.?

A. Yes, sir; I know about carrying hogs at ten cents and cattle at fifty cents and tobacco at fifty cents.

Q. And other freights in proportion?

A. Yes, sir; large tobacco hogsheads, hoop poles, lumber and other things.

Q. And groceries; you know that they did those things?

A. Yes, sir; and corn and wheat and everything else.

Cross-examination by Mr. MAXWELL:

Q. As I understand you, Captain, the Urania was in the run between Cincinnati and Pomeroy?

A. Yes, sir.

Q. And that from time to time other boats, the Sunshine and the Lizzie Bay and Nesbit were on that run?

A. Yes, sir.

Q. The Urania was taken out of that run?

A. After we gave her up; yes, sir; we had the Urania chartered.

Q. And you were the captain of that boat that made that run between Cincinnati and Pomeroy and back again?

A. Yes, sir.

Q. Whatever boat it was, you were the captain during all this time?

A. Yes, sir.

Q. And did you get these instructions from Mr. Laidley, the president of the company?

62 A. Yes, sir; that was sent to the boat and it covered me and the clerk.

Q. And you understood that from that time on you were to do all the damage you could to the Avalon?

A. I was to get the freight away from the Avalon and get her out of the trade.

Q. Break her up?

A. She was an opposition boat, and we were supposed to fight her.

Q. Break her up, or drive her out of the trade?

A. Yes, sir.

Q. And from that time you understood that was your primary purpose?

A. Yes, sir.

By the COURT: What was the date of the contract?

A. March 27th, 1899.

Q. Had you any instructions prior to that time?

A. On the 17th I had instructions from the manager of the company to make my own rates, but to get the freight.

Q. To the same effect that you understood the telegram?

A. Yes, sir.

Q. But that wasn't in writing?

A. No, sir; verbally.

Q. And those were the instructions that you understood were governing you from that time forward and that course you pursued?

A. Yes, sir.

Q. Now you used to leave Pomeroy, you say, on Sunday morning?

A. Yes, sir.

Q. And would leave Portsmouth at what time?

A. Monday morning.

Q. When did the Avalon leave Portsmouth?

A. Monday morning.

63 Q. You used to leave Portsmouth Sunday night, didn't you?

A. No, sir.

Q. Could you leave Monday morning?

A. No, sir.

Q. What change did you make, Captain?

A. We left Pomeroy Monday morning, and left Portsmouth Monday evening.

By the COURT. You just changed your time of leaving twelve hours?

A. Yes, sir.

Q. And you made that change in order to head off the Avalon?

A. And to keep her from hurting our business; yes, sir.

Q. To drive her out of business?

A. We didn't propose to let her drive us out.

Q. By whose direction did you make that change?

A. I had nothing to do with making the change; there is no authority that I have.

Q. By whose direction did you change the time for sailing from Portsmouth?

A. The manager of the company.

Q. Mr. Laidley?

A. Commodore Laidley.

Q. Then it was he who directed you to leave on Monday morning instead of Monday evening?

A. To get ahead of the Avalon; yes, sir.

Q. And you did come down ahead of her?

A. Yes, sir; we did.

Q. How many trips had she made?

A. I think we started when she started.

Q. Before she got away?

A. I think we got ahead of her the first whirl.

Q. You were advised that she had selected that date and you accordingly changed yours to get ahead of her?

64 A. Yes, sir.

Q. And on that first trip did you offer to carry freight for nothing?

A. No, sir.

Q. Well, did you cut the rates on that first trip?

A. Yes, sir.

Q. You were ahead of her?

A. Yes, sir.

Q. She hadn't cut any rates?

A. I had nothing to do with her, and am not supposed to know what she did.

Q. You didn't pay any attention then to what she did?

A. No, sir; if a man had a shipment that was going on the Avalon, I got it, if I could, regardless of circumstances.

Q. You would even take it for nothing in order to get it?

A. I didn't have to take it for nothing.

Q. You would have done it?

A. I offered to; yes, sir.

Q. If you knew a man was going to ship tobacco on the Avalon for a dollar a hogshead, you would take it for nothing, if he would let you have it?

A. Yes, sir; if he would let us have it.

Q. The public finally got onto you?

A. Yes, sir; they are onto everybody.

Q. Now you are not supposed to make money carrying on a business in that way, are you, Captain?

A. Well, no; but we tried to get all the money out of it we could.

Q. Carrying for nothing?

A. We didn't carry for nothing; we weren't afraid of them giving it to us, these fellows that we offered to take it for nothing.

Q. You were carrying it for anything you could get in order to keep it away from the Avalon?

A. Yes, sir.

65–73 Q. There was a Pittsburg line, wasn't there?

A. Yes, sir.

Q. You had no opposition from them?

A. No, sir.

Q. You had an alliance with them by which they were to take nothing south of Syracuse; you had that understanding with them?

A. Yes, sir.

Q. And if you could get rid of the Avalon you were masters of the river?

A. We got rid of the Avalon.

Q. You find that that is really the only way to get along after all, Captain, is to have a reasonable competition, isn't it?

A. (Witness does not answer.)

By Mr. ANDERSON:

Q. At any time did you take freight at a rate below what was absolutely necessary in order for you to get it?

A. No, sir.

* * * * * * *

74 F. A. LAIDLEY, who being duly sworn, testified as follows:

By Mr. ANDERSON:

Q. Captain, what is your connection with this Big Sandy Packet Company?

A. I am president and general manager of the Cincinnati, Pomeroy, Portsmouth and Big Sandy Packet Company.

Q. How long have you been connected with the river business?

75 A. It was in 1864 that I first started.

Q. How long with this company?

A. I have been a stockholder since 1884, and president and general manager since 1891.

Q. What was the condition of things when you purchased from the Bays the subject matter of this controversy?

A. Well, I bought from them the steamboats Henry M. Stanley, the Lizzie Bay and, I think, three coal flats.

Q. What was the state of affairs at that time?

A. There was opposition. The Stanley was running in the Cincinnati and Charleston trade, and was cutting the rates; and we were cutting with them. The Sherly was running to Charleston, and we always aimed to have a boat ahead of her down on Mondays, as the shippers between Portsmouth and Cincinnati took that day for shipping their freight; it seemed to be the day that it accumulated. She came down to Portsmouth and left there on Monday mornings. Our boat was there to go with her, I would have one first, and then another, and never would let her get away; and my instructions were to take the freight at any price, and take it away from them; and that continued until I bought them out.

Q. Why did you buy them out?

A. To stop opposition.

Q. Now, then, were you making any money when you bought them out?

A. No, sir.

Q. Were you losing money?

A. Well, the boat on that trip down would lose money on Mondays. We would never get enough freight to pay. I remember the Bonanza came down with two hundred and seventy-five hogsheads of tobacco that would range from seventy-five cents to twenty-five cents each; that was the only price they could get, and from Augusta we carried lots of it at twenty-five cents a hogshead.

Q. When you had opposition with the Bays, or other per-
76 sons, how did it affect the rates? Did it affect them uniformly or otherwise?

A. On the day that those two boats went down it affected the rates; still there were some people that paid the full rate. Some that wanted the line to be maintained; others said that they wanted opposition, and they wanted the lowest rates they could get; and in that way it makes the boat lose money on her down trip on Mondays; and the boat coming up, leaving on the same day down there, would take freight at a low rate to whatever point she is going.

Q. Now the point I am after is, does it affect the rates all alike—does it affect them all or only a portion of them?

A. It affects them a little bit on the other days.

Q. I mean on that day?

By the COURT: Does it affect every particle of the freight?

A. No, sir; we would get full rates for some things. I suppose probably from a half to two-thirds, something like that we carried at reduced rates.

Q. At a uniformly reduced rate?

A. Since we have a tariff, we formulated a tariff in '92 or '93, by comparing that with the railroads we made it enough less than the railroads charged to allow the parties to insure their freight. We have a regular tariff, it is not published to the public, but it is in book form, and the clerks are instructed to act by that tariff unless they have other instructions. That tariff does not apply to everyone. A wholesale grocer here in Ironton would get a special rate; that is in order to get the business to come to Cincinnati that we give some inducements; the merchants there demand it, that we give to large buyers a wholesale rate in order that they can get the trade. Now that is done by a rebate, as a rule, in order that the freight may show uniformly on the books, and the rebate is taken off.

Q. Now, was that the condition before March 19th, 1899, to November 26th, 1899, of cutting rates in that manner?

77 A. Yes, sir; it has been carried on since that up to the present time. Within that space of time, I think, the Avalon broke her shaft possibly once or twice; it may have been twice, between the 19th of March and the 26th of November, and I think she lost two weeks, possibly, at one time, and three at another, possibly a little longer at that time. She wouldn't be running but the rates of freight would be cut as the Avalon would cut the rates, and we would try to win by giving a lower rate.

Q. So this condition continued right along?

A. Yes, sir; up to the present time, and I instructed the clerks on that day to carry the freight at any price, in order to get it and the people.

Q. Do you know of any shipments of tobacco at twenty-five cents, cattle at fifty cents, and hogs at ten cents, and sheep at five cents,

and other freights in proportion during the period from March 19th to November 26, 1899, to your knowledge?

A. Only from the books, with the exception of four car loads of sheep at fourteen dollars a car at Cabin Creek; we got fourteen dollars per car; I sent the boat up there for these sheep; they were going by rail and I sent the boat after them and gave them the same rate in order to get them.

By the COURT:

Q. Otherwise they would have gone by rail?

A. Yes, sir; and we took them at this rate, that is, the same rate that the railroad offered. The reason I mention this is I remember the circumstances distinctly, as it didn't come in on these boats, and I remember sending the boat up there specially for them.

Q. Was that done on account of the opposition?

A. No, sir; I remember of sending the boat up there to get them.

Q. Did your boat that was coming down on the opposition day make or lose money during the period from March 19th, 1899 to November 26th, 1899?

78 A. I was looking over the statements. I have a statement rendered to me every week, and we have a page set apart for each, giving the receipts and the expenditures, the receipt of freights and passengers, and whatever the expenditures and stores, etc., is deducted from that.

By Mr. MAXWELL: I want to see this statement.

A. I haven't got it with me. Several times during the period they made money, but nine-tenths of the time they lost.

Q. What was the result?

A. It was a loss between those times, and it was a loss all the time with possibly the exceptions where a boat would get an unusually large trip, or something of that kind.

Q. Was there enough business in that trade for two boats?

A. There was not.

Q. And was there during the period we have spoken of in 1899?

A. No, sir.

Q. So that if you carried all the freight that the two boats together carried at the regular tariff rate it would have been a losing rate?

A. If you divide it it would be a loss; if one boat got it all you would make money.

Q. Now, what do you say as to the custom of carrying stockmen up and down when there was no opposition? Was there such a custom?

A. I don't remember what our rate is; it runs eighteen or twenty. We carry only one man free.

Q. On a carload?

A. Yes, on what will amount to a carload.

Q. But if it was less than that, what was the custom?

A. He pays his fare.

Q. When the opposition was on?

A. Oh, no; we took them free along with their stock, if only five or six head.

79 Q. What do you say, Captain, as to whether this state of affairs continued since the 26th of November, 1899, up to the present time?

A. It does.

Q. What do you say, Captain, as to the opposition of the Urania, or the Edgington boats, as compared with the opposition of the Bays at the time you bought them out?

A. It was about the some thing at any time; now when this opposition first started in with the Avalon I chartered from the Bays their steamboat, that is, the Urania, and I run her several months, paying for her so much a day during the time I needed her.

By the COURT: How many boats did you have when you bought the Bays out?

A. We have a boat daily to Pomeroy and one to Maysville.

Q. Have you more boats than you used to have?

A. We have the same number of boats, a boat a day to Pomeroy, and one a day to Maysville; we haven't any boat out of Cincinnati on Sundays.

By the COURT: Now, I understand you, in order to meet this opposition of the Avalon, you put another boat in?

A. I just changed the time of one boat.

Q. You haven't any more boats running in this trade than when you bought them out?

A. No, sir; the Avalon left Charleston on Sunday mornings, and came down to Gallipolis ahead of us, and when I heard of her starting out there on that time, I put in a boat ahead of her, and have kept ahead of her. That is the same number of boats, and we run them all the time. When the water gets low I charter low water boats to run against her.

Q. State what, if anything, has affected the business on these days?

A. There isn't more business than for one boat, and it is limited at that.

80 Q. And what has brought about that state of facts?

A. The opposition.

Q. So that there isn't business for two boats up and two boats down to Maysville?

A. No, sir; they can't live, there isn't enough of business and they can't live; the one that can hold out the longest and can fight the hardest seems to be the best.

Cross-examination by Mr. MAXWELL:

Q. Captain, after you bought the Bays out, what accommodation did you furnish to the Kanawha River trade?

A. We shipped and received freight daily for Charleston and

reshipped it at Gallipolis. We received it six days in the week and reshipped it at Gallipolis.

Q. But you didn't run a boat to Charleston?

A. Not after that.

Q. There was two years that you didn't do that?

A. I don't remember the length of time.

Q. And there was two years that you didn't run a boat out of Charleston to Pittsburg?

A. We never did that.

Q. So that the facilities that the Bays had furnished them, you discontinued?

A. I bought them out.

Q. After you bought them out you didn't supply the facilities for the people up there that they had had heretofore?

A. We supplied them daily; gave them better facilities.

Q. You never had any boat at all from the Kanawha river to Pittsburg?

A. Never did; never had anything of the kind.

Q. He did, didn't he?

A. He did; I never did run there to Pomeroy. I never run above Syracuse.

81 Q. And you didn't have any boat out of the Kanawha river, did you?

A. We had connections with a daily boat out to Charleston; we made connection at Gallipolis.

Q. That had always been in existence there, hadn't it?

A. I don't know about that.

Q. Hadn't that been in existence in Captain Bay's time?

A. The time he was running there we come down as well as on other days.

Q. The result was that at the time you bought Captain Bay out, you stopped those facilities?

A. We give them to them daily.

Q. They had that before?

A. Yes, sir, and they have it yet.

Mr. STEPHENS: I don't see the materiality of the question.

A. We were sending a boat from Cincinnati up there every day and we received freight for Charleston; we were sending a boat up to Charleston every Thursday.

Q. That is what people didn't want, wasn't it—they didn't want their freight reshipped?

A. If they don't want it reshipped, they can get it by rail.

Q. Now about the Portsmouth business; in the Bays' time they used to run a boat every day from Portsmouth, to Cincinnati, didn't they?

A. No, sir.

Q. How often?

A. When I came in there the Bays run three trips a week.

Q. Just before this contract was entered into?
A. No, sir; they hadn't been for several years.
Q. Didn't the Ruth run daily?
A. I don't know anything about his boats; I thought you asked me about my boat.
Q. I am trying to compare the facilities at the time this contract was entered into and prior thereto, with those afterward?
82 A. They run the little Ruth there.
Q. Every day?
A. No, they didn't; they run her three trips a week.
Q. They would go down one day and back the next?
A. Yes, sir; they run her tri-weekly.
Q. And that was discontinued?
A. It was no accommodation; it didn't amount to anything. It was a little bit of thing.
Q. And you didn't furnish them with any "little bit of thing"?
A. And it didn't support "that little bit of thing," either.
Q. I am asking about the trade below Portsmouth?
A. Yes, sir.
Q. Between Portsmouth and Maysville?
A. Yes, sir; we had a boat down every day.
Q. What boat was that?
A. The Stanley, the Indiana and the Courier.
Q. At the time of this contract?
A. Yes, sir; the Sunshine run to Kanawha, the Stanley would alternate, the Sunshine, Bonanza and Stanley.
Q. I am asking you about the Portsmouth trade?
A. No, not since we took the Bonanza out of there.
Q. Then there was no way for the trade to get away below Portsmouth?
A. They were supplied by the Pomeroy boat.
Q. That runs there in the night time?
A. They leave Cincinnati at five o'clock in the afternoon?
Q. Going down?
A. They leave Portsmouth at seven or eight o'clock at night.
Q. Of course, then the ports below Portsmouth had to be served in the night time?
A. Yes, sir.
Q. And they had no other facilities?
A. Yes, sir; the railroads make four or five trips a day and they went that way, too.
83 Q. Now about this line that Captain Edgington put in there?
A. That didn't last.
Q. No, you seem to have gotten away with him, too?
A. They were gotten away with opposition.
Q. Commodore, did you ever try the plan of allowing everybody to have an open, free field, and the same as a common carrier?
A. No, sir.

Q. You have spoken about there not being business enough there for two boats; I want to know if you ever tried the plan of a common carrier, as having an open route with everybody, and where everybody could come in without discrimination?

A. We have an open route; they can all come in if they want to.

Q. You have no open plan?

A. We have all the time; I want to say in connection with this contract after the contract was entered into the Bays had a pass on all the boats, and they rode up and down on all the boats for two or three years; I want to get credit for that, too.

Q. I suppose you have extended that courtesy to men that had been on the river for half a century almost?

A. I thought I had paid them in full and want credit for the passes.

Q. I believe you wrote these letters?

A. Yes, sir.

By Mr. MAXWELL: I introduce these letters in evidence from Ramsey & Maxwell to F. A. Laidley and his replies to same, all fastened together and attached hereto and made part hereof and marked Exhibit "C."

Q. Have you a copy of the tariff rate with you, Commodore?

A. No, sir; not with me.

84 Q. Was it accessible there?

A. Yes, sir; it is on a boat that will be down to-morrow.

Q. And that tariff is the regular tariff rate of your line?

A. Yes, sir.

By the COURT: And substantially the same tariff that you have had for four or five years?

A. There may be some changes in it, by letters to the clerks, telling him to make a rate where the rate has been reduced in order to compete with the railroads.

Q. It is substantially the same thing?

A. Yes, sir.

Q. Can you furnish us a copy of that?

A. Yes, sir; it will be here on the boat to-morrow and we will get it for you. (And same was produced and is hereto attached and made part hereof marked Exhibit D.)

Q. This practice of allowing rebates is a very old one, I suppose?

A. It is done by all of them.

Q. It is old, isn't it?

A. Yes, sir.

Q. It antedates the contract with the Bays?

A. Yes, sir; some people got a little better rate than others.

Q. That depends upon the amount of business and the relationship of the people?

A. It depends upon the amount of business; I don't know anything about relationship.

Q. There might be relations other than business that might affect it?

A. It was only in a business way.

By Mr. ANDERSON:

Q. Captain, you have spoken something about your boats passing down below Portsmouth and certain ports in the night; are not the freights that are shipped from those ports chiefly on wharfboats?

85&86 A. There are some landings there.

Q. But the bulk of it is from wharfboats?

A. Yes, sir.

Q. And there is always a man that stays on the wharfboats to look after those things?

A. He is supposed to be there, yes, sir.

* * * * * * *

At this point defendant rested its case.

* * * * * * *

87-287 EXHIBIT "A."

Western Union Telegraph Company.

Received at 9:10 a. m. Dated Cincinnati, O., March 27, 1899. To steamer Urania, Manchester, O.: Bring freight at any price; keep it away from Avalon.

F. A. LAIDLEY.

* * * * * * *

288 EXHIBIT S.

Edgington Packet Company.

Independent,

Portsmouth and Cincinnati Daily Line.

Steamers Chas. B. Pearce and M. P. Wells.

Opposition to Monopoly. The People's Boats.

Leave Portsmouth Daily at 12 Noon.

Leave Cincinnati Daily at 5 p. m.

From Coney Island Wharfboat, Foot of Vine Street.

Telephone 1384. Freight Received at All Hours.

Geo. W. Edgington, Manager. A. J. Mosset, Agent.

EXHIBIT T.

This agreement entered into between the Portsmouth and Pomeroy Packet Company, a corporation under the laws of Kentucky, its successors and assigns, and George W. and William Bay, their executors and administrators, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, a corporation under the laws of Ohio, its successors and assigns, of the second part. *Witnesseth*, That the said parties of the first part hereby agree to sell, and do sell to the party of the second part, the steamers Henry M. Stanley and Lizzie Bay, with all the tackle, apparel
289 and furniture of each of them, together with two deck barges, Lizzie at Ironton, and Stella, at Cincinnati; and two coal flats, one at Greenup, Kentucky, and the other in the Kanawha river, and also five hundred dollars ($500.00) in the stock of the Coney Island Wharfboat Company, for all of which property the said party of the second part is to pay, and does pay, the said party of the first part the sum of thirty thousand five hundred dollars ($30,500.00), in payments as follows, to-wit: Cash twenty thousand dollars ($20,000), note of the party of the second part for $7,000.00, payable to the order of John Barrett & Son, and endorsed by them at sixty (60) days from date, to be secured by policies in the Ætna Insurance Company on the steamboats Rhea and Scotia, each soon to become due, the proceeds of which policies when paid to be received by the parties of the first part and credited on said note; also the note of the party of the second part at four months, payable to the order of George and William Bay, for thirty-five hundred dollars ($3,500.00) with six per cent. interest from date, said last note to be secured by stock of the Louisville and Cincinnati Packet Company of fourteen thousand dollars ($14,000.00), par value.

The party of the second part also agrees to pay to George W. and William Bay the sum of thirty-six hundred dollars ($3,600) annually in advance for five (5) years from the time of the transfer of said boats and property to the party of the second part by the parties of the first part, the first payment of thirty-six hundred dollars ($3,600) in advance, payable twelve (12) months after date to the order of George W. and William Bay, with interest at six per cent. from date, and to be secured by fourteen thousand four hundred dollars' ($14,400) worth of stock of the Louisville and Cincinnati Packet Company at its par value, the other annual payments of thirty-six hundred dollars ($3,600.00), to be cash in advance, provided, however, that in case of opposition to the boats of the
290 party of the second part by other boats running from Cincinnati, Ohio, to Portsmouth, Ohio, or from Cincinnati to points above Portsmouth, not including points above Syracuse, Ohio, causing the party of the second part to carry freight and passengers at exceedingly low rates, such as tobacco at twenty-five (25) cents per hogshead; cattle at fifty (50) cents per head; hogs at ten (10) cents per head; sheep at five (5) cents per head, and other articles of freight in said proportion, the time of payment of said yearly installments of thirty-six hundred dollars ($3,600.00) shall be de-

ferred during the period of such opposition and until the same has ceased, when said payments shall be made and be resumed, so that the parties of the first part shall ultimately receive the full amount due on said annual payments of five (5) years.

It is further agreed that if said opposition shall continue without interruption for the space of two years, and no annual payments of thirty-six hundred dollars ($3,600.00) each be made under said contract by said party of the second part to said George W. and William Bay, that said agreement may be cancelled and ended at the option of said George W. and William Bay, all annual payments then unpaid to be forfeited by said parties of the first part and George W. and William Bay.

It is also agreed as a part of the consideration of this agreement, that the parties of the first part, or either of them, shall not for the term of five years from the date of this agreement be in any way, directly or indirectly, engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth,
291 Ohio, to or for points below Portsmouth, Ohio. This provision, however, not to prevent the parties of the first part from the towing and barge business so long as it in no way interferes with the freight and passenger business of the parties of the second part at and from Portsmouth, Ohio, to Cincinnati, Ohio. It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points.

It is also understood that the failure to pay any installment due under this contract after sixty (60) days demand therefor, shall cause it to be void as far as the obligations of the parties of the first part are concerned, and that the collateral, properly endorsed, provided for in the above agreement to secure said annual payment and notes, shall be left in the hands of Charles H. Stephens for the security of the parties of the first part.

In testimony whereof the parties have hereunto set their hands and seals this November 26th, A. D. 1895, in duplicate.

THE PORTSMOUTH AND POMEROY PACKET CO.,

[SEAL.] By G. W. BAY, President.

GEORGE W. BAY.

WILLIAM BAY.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY,

[SEAL.] By F. A. LAIDLEY, President.

Witness:

S. W. SMITH, Jr.

292 State of Ohio, Lawrence County, Circuit Court.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.

Petition in Error.

Filed in Circuit Court June 28, 1901.

The plaintiff in error says, that at the April term, A. D. 1901, of the court of common pleas in and for the county of Lawrence, Ohio, in a certain action then pending in said court, being cause No. 8213, on the docket ther-of, wherein George W. Bay and William Bay were plaintiffs, and The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company was defendant, the said defendants in error recovered a judgment against said plaintiffs in error; by the consideration of said court a transcript of the docket and journal entries thereof, and the original papers therein are filed herewith; also a bill of exceptions containing a complete transcript of the evidence given upon the trial and other matters. There is error in said record and proceedings in this, to-wit:

1. The court erred in the facts found, all and singular, and the facts found by the court, all and singular, are not sustained by sufficient evidence, and are against the manifest weight of the evidence, and are against the law; and said judgment is contrary to the law.

2. The court erred in rejecting the evidence offered by the defendant.

293 3. The court erred in receiving evidence objected to by defendant.

4. Said facts found, all and singular, and said judgment of the court, should have been in favor of plaintiff in error and against defendants in error.

5. Said findings of the amount due defendants in error and said judgment are excessive.

Wherefore, plaintiff in error prays that said judgment may be set aside and reversed, and that judgment be entered in favor of plaintiff in error and against defendants in error, and that it may be restored to all things it has lost by reason thereof.

STEPHENS & LINCOLN,
JULIUS L. ANDERSON,
Attorneys for Plaintiff in Error.

June 28, 1901.—The issuing and service of summons in error in above entitled action in error is hereby waived, and said defendants in error, George W. Bay and William Bay, hereby enter their ap-

pearance in said action and proceedings in error in the circuit court of Lawrence county, Ohio.

GEORGE W. BAY,
WILLIAM BAY,
Defendants in Error,
By J. O. YATES,
Their Attorney.

Bill of Exceptions. Filed in Circuit Court March 4, 1902.

Be it remembered that at the hearing of this proceeding in error at the March term of this court, A. D. 1902, the plaintiff in error applied for leave to file amendment to its petition in error, which amendment is hereto attached and made part hereof, marked "Exhibit A," to the filing of which the defendants in error
294 objected, and the court refused to grant said leave, to which plaintiff in error at the time excepted, and at the hearing of this case plaintiff in error moved the court to consider the case upon the weight of the evidence; the court refused said motion. Plaintiff in error at the time excepted to said refusal and asked the court to note its exception on the record, which is accordingly done, and presents this, its bill of exceptions, which is signed and allowed in order to be made part of the record but not spread upon the journal this 4th day of March, 1902.

HIRAM L. SIBLEY,
THOMAS CHERRINGTON,
THOMAS A. JONES, Judges.

EXHIBIT A.

Now, the plaintiff in error makes this amendment to its original petition in error, and for said amendment says:

There is error in said record and proceedings in addition to the assignments of error in said original petition in error, in this, towit:

First. Said decision of the court of common pleas is not sustained by sufficient evidence.

Second. Said decision is also contrary to law.

Wherefore plaintiff in error prays as in said original petition in error.

STEPHENS & LINCOLN,
JULIUS L. ANDERSON,
Attorneys for Plaintiff in Error.

Journal Entries.

Jour., Vol. 3, Page 259, March Term, 2d Day, March 5th, A. D. 1902.

This proceeding in error came on to be heard this fourth
295 day of March, 1902, whereupon plaintiff in error applied for leave to file an amendment of its petition in error.

The court refused to grant said leave, to which plaintiff in error excepted; and thereupon, the court finding no error in the judgment of the court of common pleas, said judgment is hereby affirmed at the cost of the plaintiff in error, without penalty, to which plaintiff in error excepts, and it is ordered that a mandate issue to the court of common pleas to carry this judgment into effect. The court declines to pass upon the question whether the judgment of the court of common pleas is contrary to the weight of the evidence, to which refusal of the court to pass upon the weight of evidence the plaintiff in error excepts and presents its bill of exceptions, which is signed and allowed and ordered to be made part of the record and filed.

Jour. 3, Page 264, March Term, 3d Day, March 6th, A. D. 1902.

The last paragraph of the judgment of affirmance in this case heretofore entered is hereby amended and modified so as to read:

The court declines to pass upon the question whether the judgment of the court of common pleas is contrary to the weight of the evidence, for the reason that such ground is neither embraced in the motion for a new trial or set forth in the petition in error filed herein, to which refusal of the court to pass upon the weight of the evidence the plaintiff in error excepts, and duly presented its bill of exceptions, which was signed and allowed, and ordered to be made part of the record, and filed.

296 State of Ohio, Supreme Court.

THE CINCINNATI, PORTSMOUTH, BIG SANDY, AND POMEROY PACKET Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.

First Petition in Error.

Filed in Supreme Court April 28, 1902.

Plaintiff in error says that at the March term, A. D. 1902, of the circuit court in and for the county of Lawrence and State of Ohio, in a certain proceeding in error then pending in said court, being cause No. 349 on the docket thereof, wherein The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company was plaintiff in error and George W. Bay and William Bay were defendants in error, the said George W. Bay and William Bay recovered a judgment against the said Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, by the consideration of said court affirming the judgment of the common pleas court for said county of Lawrence, a transcript of the docket and journal entries in said cause, together with the original papers in said cause and bills of exception are

herewith filed. There is error in said record, proceedings and judgment in this, to-wit:

1. The court erred in affirming said judgment of the court of common pleas.

2. The court erred in refusing to allow plaintiff to file its amendment to the petition in error set out in the bill of exceptions.

3. The court erred in refusing to pass upon the weight of the evidence.

297 4. The court erred in refusing to consider the evidence contained in the bill of exceptions.

5. The court erred in affirming the judgment of the common pleas court without considering the weight of the evidence.

6. The judgment of the circuit court was contrary to the law of the case.

7. Said judgment was given for the defendants in error when it should have been given for plaintiff in error.

8. The amount involved in this case, exclusive of interest and costs exceeds the sum of three hundred dollars, all of which will more fully appear from the transcript, original papers and bills of exception herewith filed.

Wherefore plaintiff in error prays that the judgment of the circuit court of Lawrence county, Ohio, and of the common pleas court of Lawrence county, Ohio, be vacated and reversed, and that it recover all things that it has lost by reason of the premises.

STEPHENS & LINCOLN,
JULIUS L. ANDERSON,
Attorneys for Plaintiff in Error

The defendants in error hereby waive the issuance and service of summons in error and hereby enter their appearance herein, in above entitled cause in error in the supreme court of Ohio, of The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, plaintiff in error, *vs.* George W. Bay and William Bay, defendants in error.

J. O. YATES,
Of Counsel for Defendants in Error.

298 Supreme Court of the State of Ohio.

Journal Entries.

Jour. 3, Page 284, January Term, Thursday, June 24th, A. D. 1903.

This cause came on to be heard upon the transcript of the record of the circuit court of Lawrence county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, vacated for error in refusing to consider the bill of exceptions.

And this cause is remanded to said circuit court, with directions to consider the bill of exceptions, and for further proceedings according to law.

It is further considered that the plaintiff in error recover of defendants in error its costs herein.

Ordered, that a special mandate be sent the circuit court of Lawrence county to carry this judgment into execution.

To the honorable circuit court within and for the county of Lawrence, Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our supreme court of Ohio, in the cause of The Cincinnati, Portsmouth, Big Sandy and Pittsburg Packet Company, *vs.* George W. Bay, *et al.*, into execution, the petition in error herein and heretofore granted, to the contrary notwithstanding.

Lawrence County Circuit Court.

Journal 3, October Term, 1st Day, October 20th, A. D. 1903.

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said, The Cincinnati, Portsmouth, Pomeroy and Big Sandy Packet Company, plaintiffs in error herein together with the original papers and pleading and
299 bill of exceptions, and a duly certified transcript of the orders and judgment of the court of common pleas of Lawrence county, Ohio, filed therewith in the said court of common pleas, wherein The Cincinnati, Portsmouth, Pomeroy and Big Sandy Packet Company, — plaintiff, and George W. Bay and William Bay, defendants, mentioned and referred to in said petition in error, and was argued by counsel. Upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas.

It is, thereupon, considered, ordered and adjudged by this court, that the judgment and proceedings of the said court of common pleas in said cause in favor of the said defendants in error, and against the said plaintiffs in error be, and the same are hereby in all things affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further, considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, and in default thereof that execution issue therefor.

To all, and singular, of which plaintiff in error at the time excepted, and its exceptions are hereby noted on the record.

Ordered, that a special mandate be sent to the court of common pleas, of Lawrence county, to carry this judgment into execution.

300 STATE OF OHIO:

Supreme Court.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.

Second Petition in Error.

Filed in the Supreme Court Nov. 9th, 1903.

Plaintiff in error says that at the October term, A. D. 1903, of the circuit court, in and for the county of Lawrence and State of Ohio, in a certain proceeding in error then pending in said court, being cause No. 349 on the docket thereof, wherein The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company was plaintiff in error and George W. Bay and William Bay were defendants in error, the said George W. Bay and William Bay recovered a judgment against said Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company by the consideration of said court affirming the judgment of the court of common pleas for said county of Lawrence; a transcript of the docket and journal entries in cause together with the original papers in said cause and bills of exceptions are herewith filed. There is error in said record, proceedings and judgment in this, to-wit:

First. The court erred in holding and deciding that the contract sued upon by the defendants in error was not in illegal restraint of trade, and invalid and void as such, but was valid and enforceable.

Second. The court erred in holding and deciding against the claim of the plaintiff in error that said contract sued upon by the
301 defendants in error was not illegal under the act of Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies;" approved July 2d, 1890, and known as the "Sherman act," and in holding and deciding against the rights and immunities claimed by the plaintiff in error under said "Sherman act."

Third. The judgment of the circuit court was contrary to law.

Fourth. Said judgment was given for the defendants in error when it should have been given for the plaintiff in error.

Fifth. The court erred in affirming the judgment of the court of common pleas.

Plaintiff in error further says that the amount involved in this case, exclusive of interest and costs, exceeds the sum of $300.00, all of which will more fully appear from the transcript, original papers and bills of exceptions herewith filed.

Wherefore plaintiff in error prays that the judgments of the circuit court and of the common pleas court, of Lawrence county, Ohio,

be vacated and reversed, and that it recover all things that it has lost by reason of the premises.

JULIUS L. ANDERSON,
STEPHENS & LINCOLN,
Attorneys for Plaintiff in Error.

Defendants in error hereby waive the issuance and service of summons in error, and hereby enter their appearance in the supreme court herein.

LAWRENCE MAXWELL, JR.,
Attorney for the Defendants in Error.

November 6th, 1903.

302 In the Supreme Court of Ohio, January Term, A. D. 1904.

THE STATE OF OHIO, City of Columbus, } ss:

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to-wit:

THE CINCINNATI, PORTSMOUTH, BIG SANDY & Pomeroy Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
} #8708. Error to the Circuit Court of Lawrence County.

Nov. 9, 1903. Petition in error, waiver, circuit court transcript, original papers and bill of exceptions filed.
" " " Papers sent to Stephens & Lincoln, Cincinnati, O.
" " " Papers returned.
Jan'y 5, 1904. Printed record filed.
" 6 " Proof of service filed.
Ap'l 8 " Plaintiff's printed brief and proof of service filed.
" 12, " Additional proof of service of record and brief filed.
June 10, " Defendants' printed brief and proof of service filed.
Dec. 3, " Plaintiff's printed additional points filed.
" 5, " Proof of service filed.
Dec. 13, " Judgment affirmed. Journal entry:

This cause came on to be heard upon the transcript of the record of the circuit court of Lawrence county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a special mandate be sent the court of common pleas of Lawrence county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the circuit court of Lawrence county, "for entry."

Journal No. 20, page 99.

Dec. 19, 1904. Entry of certification: Journal entry:

On motion of said plaintiff in error, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, this court in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error from the circuit court of Lawrence county, Ohio, and in the
303 arguments, both oral and by brief made in this court on behalf of the plaintiff in error, it was insisted and relied upon by said plaintiff in error that the contract sued upon by the defendants in error was illegal and void under the act of Congress approved July 2nd, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Sherman anti-trust act," as being in illegal restraint of interstate trade and commerce and providing for an illegal combination or conspiracy in restraint of such trade and commerce and for an unlawful monopoly of a part of such trade and commerce within the meaning of said act of Congress; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to said plaintiff in error as appears in the entry and judgment of affirmance heretofore made herein.

It is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case could be had.

Journal No. 20, page 103.

Dec. 19, 1904. Assignment of errors filed.
" " " Petition for writ of error filed.
" 20, " Mandate issued.
" " " Copy of entry of certification sent clerk of courts.
" " " Papers sent clerk.
" 22, " Order allowing writ of error filed.
" " " Bond filed. (In duplicate.)
" 23, " Writ of error filed.
" " " Citation and acknowledgment of receipt of copy by attorney for defendant in error filed.

304 Circuit Court, Lawrence County, Ohio.

THE CINCINNATI, PORTSMOUTH AND BIG SANDY PACKETT Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
} Decision.

The case of The Cincinnati, Portsmouth and Big Sandy Packett Company against George W. Bay and William Bay comes into this court on petition in error from the common pleas.

A number of errors are assigned in the record, only two or three of which have been insisted upon or argued before this court. The case below was brought on a promise contained in a written contract by which, in brief, the plaintiffs George W. Bay and William Bay stated that in 1895 the plaintiffs and the Portsmouth and Pomeroy Packett Company entered into a written contract with the defendant whereby said Portsmouth and Pomeroy Packet Company and said George W. Bay and William Bay sold and transferred to the defendant said steamboat- Henry M. Stanley and Lizzie Bay with all the attachments, furniture etc., for the consideration of $30,500. The petition recites that the Portsmouth and Pomeroy Packet Company and said plaintiffs agreed with the defendants that neither of them would for five years from the date of said sale and transfer, in any way directly or indirectly, engage in running or operating and be in any way interested in the running of said boats from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points.

305 And that in consideration thereof and in addition to the consideration of $30,500 the defendants agreed to pay the plaintiffs George W. Bay and William Bay $3600 in advance; the first payment to be paid upon the delivery of the property mentioned in the contract to the Big Sandy Company; the plaintiff argues that the four payments had been made but that a payment which was due on November 26th, 1899, had not been paid and plaintiffs pray for judgment.

The answer of the Cincinnati, Portsmouth and Big Sandy Packet Company contains an admission of the organization in Kentucky of the Portsmouth Packet Company, that they are an Ohio corporation and denying the other allegations and further and for a second statement say that said contract contained another stipulation viz: That in consideration of the operation of the boats of the second party or other boats running from Cincinnati, Ohio, to Portsmouth, Ohio, or from Cincinnati to points above Portsmouth not including points above Syracuse, Ohio, causing party of the second part to carry freight and passengers at a greatly reduced rate, set out in the petition, that these payments shall be made to the party of the first part in five years and further allege that such opposition did appear in March, 1889, by which the Big Sandy Company was compelled

to carry freight at the low rates mentioned in the contract and by reason of such opposition there was nothing due on said last payment of $3600 and by way of counter-claims seeks to recover back the former payments paid in November, 1898 because of the failure of the consideration by the opposition thereafter and that they shall further recover back the $3600 already paid. The reply denies all these material allegations.

The case being one at law, the parties both waived a jury and submitted the case to the court. Quite a large amount of testimony was introduced below by plaintiffs and defendant, in the first
306 place seeking to show on behalf of the defendant that such opposition did appear in March, 1899 as that they were compelled to carry freight at the low prices mentioned in the contract and that the same has continued and therefore their payment of $3600 is not due. On the other hand, there is testimony tending to show that no such opposition appeared which caused the Big Sandy Company to carry freight at such exceedingly low prices as mentioned in the contract and that in point of fact, they did not do so. The court below upon that evidence found in favor of the plaintiffs below George W. Bay and William Bay.

That testimony has been read in our hearing and the testimony discloses that only a small portion of goods was carried as low as the prices mentioned in the contract, amounting only in all, to the sum of $44.60, being only, as is claimed by counsel in argument, about one-fifth of the usual freight taken in on a trip. The court at least found in its judgment below that no opposition had appeared during the time mentioned as would cause the Big Sandy Packet Company to carry freights at such exceedingly low prices. On that contention the testimony was in conflict. We are not inclined to disturb the finding of the court below upon that question of fact; it appears now before us in the same light as though the contention had been submitted on the question of fact to a jury and by the verdict of the jury the question had been passed upon and where there is such a clear conflict in the testimony as there appears in this bill of exceptions we cannot set aside the verdict of the jury,—we cannot set aside the finding of the court standing in the place of a verdict of the jury, we cannot set aside the finding of the court on the ground that the judgment is not sustained by sufficient evidence. On the other hand, I may say, that if it were a matter we could go into, we should say that the preponderance of the evidence
307 shows that there was no such opposition appeared as caused the defendant, The Big Sandy Packet Company within the meaning of their contract to carry freights at such exceedingly low prices. The instances are so few and isolated, if established at all as that we could not say by a fair construction of the contract that the Big Sandy Packet Company is entitled to their claim of the benefit they claim in the contract.

We therefore pass to the consideration of the other questions in the case. It is claimed on behalf of the Big Sandy Packet Com-

pany that the contract entered into by the Portsmouth Packet Company and George and William Bay with them, was within the Valentine act passed by the legislature of the State of Ohio, and that it also falls within the act known as the Sherman anti-trust act passed by Congress. The first question that meets us at the threshhold of this investigation is an objection on the part of the defendant in error here that the legality of the contract is not to be passed upon—that the illegality of the contract must be plead before the party can take advantage of it. And counsel in their brief in support of that contention have cited to the court a number of cases, no Ohio cases however, which lay down such a rule, but a number of other cases in other courts which do lay down the rule that before a party can take advantage of the illegality of a contract he should do so by special pleadings. On the other hand counsel for plaintiffs in error have cited us to some cases which hold the contrary and among others a United States case, which case is cited in 103 U. S. Rep., page 26. In Beach on modern law of contract in section 1443 we find an applicable citation. A number of other cases are cited from Michigan, Mass., Ind., and Ill., and New York, and we think this matter is sufficiently disclosed in the record by the evidence.

308 The provisions of the Valentine act it is contended, do not apply, because this contract was made an- executed before the passage or before the taking effect of the Valentine act. This contract was executed in 1895, but we are not in this case to settle that question. The supreme court of our State in 61 O. S. page 548 in discussing this very act, the Valentine act, uses very decisive language.

Now is does appear from the pleadings and record in this case, that both of these packet companies before they sold out and the Big Sandy Company after it became the purchaser of the Portsmouth and Pomeroy Packet Company and by the contract it shows that it does come within the Sherman act so far as all the facts are disclosed and so far as the interstate commerce is concerned.

Now in our supreme court heretofore, in considering contracts of this character they have laid down a principal of law that a contract which is only in partial restraint of trade that such a restraining of trade is reasonable and lawful. That rule is laid down in the 57 O. S. page 602; there is a case also in the 2 O. S. and in 36 O. S. page 517.

Now the question coming before us is whether or not these decisions of our supreme court apply at all when considering and in reference to the Sherman act. The matter is almost decided in 61 O. S. at page 548. Now if this is to apply that these contracts are illegal then no one could sell the good will of any concern, the good will of a business concern and in consideration of it passing to the purchaser, the vendor agrees to remain out of the business for a specified time in order that the purchaser may secure the full fruits of his purchase. Now did the Congress intend to restrain such a

thing as that? Did they intend to destroy according to the Constitution of the United States life, liberty in regard to one's own
309 individual property? Did they intend to destroy that foremost law of the country guaranteeing to every citizen the right to contract as he pleases with regard to his property? Is not the good will the name the customer all along applies to hard labor and honest dealing between citizens of one country offered by one firm, person or party? Is not that property—certainly no one will deny that it is property, and if we are to strike out that side of the legal terms of the Sherman act then they denied to a citizen a right guaranteed by the United States as well as the State right. Now did they intend that?

Now a very well considered case was decided by Judge Taft when United States circuit judge in 1898; the United States against the Addyston Pipe & Steel Company. The contract in that case was sought to be brought within the provisions of the Sherman act was similar in its relations to this one, that of a conspiracy manifested and the court found that there was not a conspiracy, an active fraud between the parties who were handling these pipes. That while on its fact it seemed a conspiracy that there was in point of fact no conspiracy and this was not so, and the judge found that it not only came within the Sherman act on the ground that it was detrimental to trade but that it was a conspiracy to defraud. The sole object and purpose of all these contracts reviewed by the Supreme Court of the United States was to restrain or limit in some way trade or commerce. Now we have a contract before us; what is it? The contract provides for a sale by George W. Bay and William Bay and the Portsmouth and Pomeroy Packet Company of the first party and the Big Sandy Company of the second part that the party of the first part for the consideration of $30,500 to them paid the
310 right to this property is turned over and as a further consideration for the sale the purchaser agrees to pay George W. and William Bay $3600 a year for the period of five years providing they refrain for the period of five years from putting any boats in the trade carrying passengers and transportation between Pomeroy and Cincinnati and other points. Now here is a contract the primary object of it being the sale of this property, the consideration for the sale and the transfer of the four or six boats; it further appears in the testimony and in the pleadings, that George W. Bay and William Bay had been for many years carrying on transportation upon the river and that they had a large percentage of good will and for the consideration they would, for the term of five years, refrain from going into the same business and they were to receive $3600 a year and the Big Sandy was to enjoy what? Was to enjoy the full fruits of the purchase from the Bays and the Portsmouth & Pomeroy Packet Company; otherwise, without such a consideration, would the sale ever have been made and could you say that the reasonable profit, the reasonable value of that property the fruits of which would have been enjoyed reasonably, unless the Bays re-

frained from going into the same business within a limited period of time and can you say that George W. and William Bay could transfer the good will for five years to the party purchasing in this case if such a contract and the valuable consideration of $3600 a year. If a transfer of their good will is within the prohibitions of the Sherman act, then there was no such sale of the good will. In the United States no good will can be sold; if so sold, then it comes within the provisions of the Sherman act. Now there is no case cited to us in which this question has been brought up and we learn from the 61 O. S., that the Supreme Court leaves that question open as to
311 whether contracts of that character or within its provisions, therefore, it becomes a new question, but when confronted with the idea that the good will in the sale of property violates no rule that can be held be any citizen of the United States and that the Constitution would deprive a person from selling his own property would certainly violate a merely affirmative principal of law that comes within the Sherman act.

Now we have found one case, my brother Jones went to a lawyer's office and he found a *nisi prius* case in the 8. Nisi Prius Rep., page 311 and that states that the contract came within the Valentine law, and the court there takes the same view as we have already in this opinion, that when the terms of a contract provides that there was a sale of property and the sale of good will is simply amenable to a fair contract, it is not within the provisions of the Valentine law: it should receive the same consideration as within the Sherman act. That is a case that is exactly parallel to the case at bar we think.

Now it might be said that after all our discussions and examination of the *case* which has been as thorough as we could possibly make it, we have examined the cases because it is to us an important question, and we have arrived at this conclusion after mature deliberation, and we stick to the old landmarks laid down by our Supreme Court and Constitution, and we cannot see where the right guaranteeing to every citizen the right to sell his property is not supported by a provision of the Sherman act and which guarantees to every man the right to sell his good will which otherwise he could not, in case the contract was amenable. That portion of the contract which provides that the Big Sandy Company shall maintain boats above Portsmouth is not in controversy. That might properly fall
312 within the direct provisions of the Sherman act. All we have to do with the main controversy in this case is in regard to the provisions of the contract, because no provision of the contract is disputed here that they were to maintain boats from Cincinnati to Portsmouth. We therefore affirm this judgment of the court below without penalty.

[Endorsed:] Circuit court's decision in Bay case. Cincinnati, Portsmouth, Big Sandy Packet Co. *vs.* George W. & Wm. Bay. Filed supreme court of Ohio Jan. 19 1905. L. E. Emerson, clerk.

313 Supreme Court of the State of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
} No. 8708.

Entry of Certification.

On motion of said plaintiff in error, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, this court in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error from the circuit court of Lawrence county, Ohio, and in the arguments, both oral and by brief, made in this court on behalf of the plaintiff in error, it was insisted and relied upon by said plaintiff in error that the contract sued upon by the defendants in error was illegal and void under the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" commonly called the "Sherman anti-trust act" as being in illegal restraint of interstate trade and commerce and providing for an illegal combination or conspiracy in restraint of such trade and commerce and for an unlawful monopoly of a part of such trade and commerce within the meaning of said act of Congress; and it became material to the determination
314 of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to said plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein.

It is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case could be had.

315 [Endorsed:] 8708 Supreme court of Ohio The Cin'ti Portsmouth Big Sandy & Pomeroy Packet Co. pl'ff in error vs. George W. Bay and William Bay def'ts in error Entry of certification O. K. Spear, C. J.

316 The Supreme Court of the State of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
} No. 8708.

To the Honorable William T. Spear, chief justice of the supreme court of the State of Ohio:

The petition of the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, respectfully shows that in an action entitled as in the caption of this petition and between the parties therein named on the 13th day of December, 1904, final judgment was rendered against your petitioner by the supreme court of the State of Ohio, that being the highest court of law or equity in said State of Ohio and the highest court of said State in which a decision in said suit or action could be had; that in said action your petitioner specially set up and distinctly claimed rights, privileges and immunities under the act of Congress approved July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called "the Sherman anti-trust act," and the decision of said the supreme court of Ohio was against said rights, privileges and immunities so specially set up and claimed by your petitioner.

317 Your petitioner further shows that the said action or suit was an action at law for the recovery of $3600.00 under a contract between the plaintiff in error above named, on the one part, and the defendants in error above named and also the Portsmouth and Pomeroy Packet Company on the other part, all of said parties being engaged as common carriers of freight and passengers on the Ohio and Kanawha rivers by steamboats and other watercrafts to, from, between and among points in the States of Ohio, West Virginia and Kentucky, which contract was, on its face and in fact, in restraint of trade or commerce among the several States, to wit, the States of Ohio, West Virginia, and Kentucky aforesaid and provided for a combination or conspiracy in restraint of such trade or commerce among such States and for a monopoly or combination or conspiracy to secure a monopoly of a part of such trade or commerce among such States within the meaning of said act of Congress; that the sole object and prayer of the plaintiffs in said action, being the defendants in error above named, was to recover of your petitioner, the plaintiff in error above named, the consideration provided in said contract for such unlawful restraint of interstate trade or commerce, such unlawful combination or conspiracy in restraint of interstate trade or commerce and such unlawful monopoly of a part of such interstate trade or commerce and your petitioner set up specially and distinctly claimed immunity from liability under

said contract by reason of the provisions of said act of Congress both in said supreme court of Ohio and in the courts of Ohio inferior thereto.

318 But said supreme court of Ohio decided against said immunity so claimed and decided that said contract was not illegal or void under said act of Congress and rendered its final judgment against your petitioner for the amount claimed under said contract, notwithstanding the provisions of said act of Congress and the claim of your petitioner thereunder. All of which will more fully appear on inspection of said contract and said record in said court.

Petitioner further shows, that a Federal question was made in said case, to wit, as hereinbefore set out, and that said final judgment of said supreme court was repugnant to and in conflict with the laws of the United States and particularly to the act of Congress aforesaid, commonly called the "Sherman anti-trust act" and that said final judgment of said supreme court was contrary thereto and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore your petitioner presents herewith his assignment of errors and prays that a writ of error from the Supreme Court of the United States may be allowed and issue in this behalf to the supreme court of the State of Ohio for the correction of the errors so complained of; that a transcript of record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the statute in such case made and provided said bond and writ of error may operate a supersedeas; that the error complained of may be reviewed by the Supreme Court of the United States and the judgment aforesaid of said supreme court of Ohio be reversed.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET COMPANY,

By Its Attorneys in Law and in Fact,
JULIUS L. ANDERSON,
STEPHENS, LINCOLN & STEPHENS,
Attornies & of Counsel for Petitioner.

319 The writ of error as prayed for in the foregoing petition is hereby allowed this nineteenth day of December A. D. 1904, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $9,500.00.

Dated at Columbus, Ohio, this nineteenth day of December, A. D. 1904.

WILLIAM T. SPEAR,
Chief Justice of the State of Ohio.

320 [Endorsed:] Supreme court of Ohio The Cincinnati Portsmouth Big Sandy & Pomeroy Packet Co. pl'ff in error *vs.* George W. Bay & William Bay defendants in error Petition for writ of error from the Supreme Court of the United States to the supreme court of Ohio Filed, supreme court of Ohio. Dec. 19 1904 L. E. Emerson, clerk

321 The Supreme Court of the State of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error. } No. 8708.

Assignments of Errors.

Now comes the above named plaintiff in error, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, and submits that in the record, proceedings, decision and final judgment of the supreme court of the State of Ohio in the above entitled matter, there is manifest error in this, towit, and makes the following assignments of error:

1. The court erred in holding and deciding, against the claim of the plaintiff in error, that the contract sued upon by the defendants in error was not illegal under the act of Congress entitled "An act to protect trade and commerce against *the* unlawful restraints and monopolies" approved July 2, 1890 and commonly called the "Sherman anti-trust act," and in holding and deciding against the rights and immunities claimed by the plaintiff in error under said "Sherman act."

2. The court erred in holding and deciding that the contract sued upon in this action was legal and valid and that the plaintiff in error was liable under such contract notwithstanding the provisions of said act of Congress, commonly known as the "Sherman anti-trust act," aforesaid, which was called to the attention of the court.

322 3. The court erred in holding and deciding that the contract sued upon by the defendants in error was not in illegal restraint of trade or commerce among the States and not invalid and as such but was valid and enforceable.

4. The judgment of said the supreme court of the State of Ohio was contrary to law.

5. The judgment of said the supreme court of the State of Ohio was for the defendants in error when it should have been given and rendered for the plaintiff in error.

6. Said supreme court of the State of Ohio erred in affirming the judgment of the circuit court of Lawrence county, Ohio.

The validity of said contract sued upon was denied and drawn in

question by the plaintiff in error on the ground that the same was in contravention of and repugnant to the said act of Congress known as the "Sherman anti-trust act" and immunity from liability under said contract was specially set up and distinctly claimed by the plaintiff in error under said act of Congress. But the decision and final judgment of the supreme court of Ohio was contrary to the contention of the plaintiff in error and repugnant to the true intent and meaning of said act of Congress and against the rights, privileges and immunities specially set up and distinctly claimed by said plaintiff in error under such act of Congress A decision of the Federal question so raised was necessary to the final judgment rendered by said the supreme court of Ohio in said action. Said supreme court of the State of Ohio was and is the highest court of said State in which a decision of said cause and of the questions aforesaid could be had and its judgment against the plaintiff in error was and is a final judgment in said cause.

323 For which errors, the plaintiff in error, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, prays that the judgment of the said the supreme court of the State of Ohio, dated December 13, 1904, be reversed, annul-ed and held for naught; that judgment be entered for the plaintiff in error, the said The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, and for costs and that it be restored to all things which it has lost by the action and because of said judgment and decision of said the supreme court of the State of Ohio.

JULIUS L. ANDERSON,
STEPHENS, LINCOLN & STEPHENS,
Attorneys and of Counsel for Plaintiff in Error.

324 [Endorsed:] 8708. Supreme court of Ohio. The Cin'ti, Portsmouth, Big Sandy and Pomeroy Packet Co., pl'ff in error *vs.* George W. Bay and William Bay, defendants in error. Assignments of error. Filed supreme court of Ohio Dec. 19, 1904. L. E. Emerson, clerk.

325 The Supreme Court of the State of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY Packet Company, Plaintiff in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error. } No. 8708.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error herein for the writ of error from the Supreme Court of the United States to the supreme court of the State of Ohio, and upon examination of said petition and record in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court
of the State of Ohio.

326 [Endorsed:] Supreme court of Ohio. The Cin'ti, Portsmouth, Big Sandy and Pomeroy Packet Co., pl'ff in error, *vs.* George W. Bay & William Bay, defendant- in error. Order allowing writ of error. Filed supreme court of Ohio, Dec. 22, 1904. L. E. Emerson, clerk.

327 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said supreme court of the State of Ohio before you, being the highest court of said State in which a decision could be had in the said suit between The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, plaintiff in error, in said court and defendant in the court of common pleas of Lawrence county, Ohio, and George W. Bay and William Bay, defendants in error, in the supreme court of Ohio and plaintiffs in said court of common pleas, wherein title, right, privilege, immunity or exemption, was and is claimed by the plaintiff in error under a statute of the United States, to-wit, the act of Congress approved July 2nd 1890 entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and wherein was drawn in question the construction of such act of Congress, and the decision was against the title, right, privilege, immunity or exemption specially set up or claimed under said act of Congress, manifest error hath happened to the great damage of the said The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under the seal of your court, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at the city of Washington on the *on the* 22d
328 day of January next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what *is* right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of December in the year of our Lord one thousand nine hundred and four.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the United States
for the Southern District of Ohio.

Allowed, to operate as a supersedeas bond by

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

329 [Endorsed:] No. —. United States Supreme Court. The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co., pl'ff in error, *vs.* George W. Bay and William Bay, def'ts in error. Writ of error from the Supreme Court of the United States to the supreme court of the State of Ohio Filed supreme court of Ohio Dec. 23 1904 L. E. Emerson, clerk Julius L. Anderson and John Ledyard Lincoln of counsel for the plaintiff in error Lawrence Maxwell, Jr. of counsel for defendants in error.

330 The Supreme Court of the State of Ohio.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY Packet Company, Plaintiff in Error,
against
GEORGE W. BAY and WILLIAM BAY, Defendants in Error. } No. 8708.

Bond.

Know all men by these presents that we, The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, as principal, and American Bonding Company of Baltimore, as sureties are held and firmly bound unto George W. Bay and William Bay in the sum of $9500.00, ninety-five hundred dollars, to be paid to the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our heirs, successors, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this twenty-first day of December, A. D., 1904.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Ohio,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error

to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwose to remain in full force and effect.

[Seal Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, Cin'ti, O.]

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET CO.,
By F. A. LAIDLEY, Treas. & General Manager.

[Seal American Bonding Company of Baltimore, Incorporated 1894.]

AMERICAN BONDING COMPANY OF BALTIMORE,
By JOHN DOYLE, Vice President.

Attest: EMILY M. LANGERMAN,
Ass't Sec'y.

331 Form 400.—Revised September, 1903.

Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

U. S. Internal Revenue.

(This form of qualification is to be used in connection with the execution of all bonds taken by collectors when the surety thereon is a guarantee or surety company, and this blank, form 400, will be annexed to the bond unless a similar form of qualification is printed on the bond.)

STATE OF OHIO, } ss:
County of Hamilton, }

On this 21st day of December, one thousand nine hundred and four, before me personally came John Doyle known to me to be the vice president of the American Bonding Company of Baltimore, the corporation described in and which executed the annexed bond of the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of Cincinnati, State of Ohio; that he is the vice president of said American Bonding Company; and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (form —) of the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company is the corporate seal of said American Bonding Company, and was thereto affixed by order and authority of the board of directors of said company; that he signed his name thereto by like order and

authority as vice president of said company; * [that he is acquainted with Emily M. Langerman and knows her to be the assistant secretary of said company; that the signature of said Emily M. Langerman subscribed to said bond is in the genuine handwriting of said Emily M. Langerman, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent;] and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of five hundred thousand dollars.

JOHN DOYLE.
(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 21st day of December, 1904.

[Notarial Seal, Hamilton County, Ohio.]

FRED L. HOFFMAN,
Notary Public, Hamilton County, State of Ohio.
(Officer's signature, description, and seal.)

Commission expires 6 / 22 / 07.

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* NOTE.—Where the bond and foregoing affidavit are executed by an attorney in fact, or agent, that portion of the affidavit included in brackets may be omitted.

332 Form 2—. Local Board, A.

Extracts from Charter of American Bonding Company of Baltimore.

"The said company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, county, city, corporation, company, person or persons whatsoever; to become security for the faithful performance of any trust, office, duty, contract or agreement, and to supersede any judgment or to go upon any appeal or other bond."

* * * * * * *

"That the directors shall * * * elect from their number * * * an executive committee."

"The executive committee so chosen * * * shall have power to elect non-resident local boards, non-resident local vice-presidents and non-resident local assistant secretaries * * * with power to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said company to the same effect and with the same binding obligations as if the said instruments had been executed by the president or vice-president and secretary or assistant secretary." * * *

* * * * * * *

"That the name of the said body corporate is * * * changed from 'The American Bonding and Trust Company of Baltimore City' to the 'American Bonding Company of Baltimore.'"

* * * * * * *

Extract from Minutes of a Meeting of the Executive Committee Held at the Office of the Company at Baltimore, Maryland, on the Tenth Day of November, 1902, * * *

Mr. Ernest Hoen, Jr., presented the following resolution, seconded by Mr. James S. Woodside:

Preamble—*Whereas:* In virtue of certain resolutions dated July 31st, 1902, William T. Perkins and John Doyle were declared appointed or elected vice-presidents, and Robert F. Wirthwine and Emily M. Langerman were declared appointed or elected assistant secretaries to serve in the city of Cincinnati, State of Ohio: Now therefore;

"*Resolved*, That said appointment or election of said persons, for reason, is hereby declared null and void, and all powers granted under said resolutions are hereby revoked; to more definitely determine the purpose and intention of said annullment and revocation, be it further;

"*Resolved*, That there is hereby nominated for non-resident local officers to serve at Cincinnati, Hamilton county, Ohio, the following:

Vice-presidents: John Doyle and Fred L. Hoffman

Assistant secretaries: Thorpe Miles and Emily M. Langerman

And there is hereby vested in said John Doyle and Fred L. Hoffman as vice-presidents, and in each of them, full right, power and authority to execute, sign, seal and deliver in the name and on behalf of said company any and all bonds, obligations, or undertakings required in judicial proceedings, in any and all courts in said State of Ohio and in the United States circuit and district courts in said State, when attested by the signature of Thorpe Miles or Emily M. Langerman as assistant secretary.

And on ballot, a majority of the whole committee having voted in the affirmative, the said resolution was adopted, and the aforesaid nominees were declared to be duly elected as such officers of the company with powers as aforesaid.

Certificate.

We, Chas. A. Webb, vice president, and Samuel H. Shriver, secretary of the American Bonding Company of Baltimore, hereby certify that the foregoing are true and correct copies taken from the records of the American Bonding Company of Baltimore.

In witness whereof, we have hereunto subscribed our names and affixed the corporate seal of the American Bonding Company of Baltimore, at Baltimore, Maryland, this 11th day of March, 1903.

CHAS. A. WEBB,
Vice-President.

[Seal American Bonding Company of Baltimore. Incorporated 1894.]

SAMUEL H. SHRIVER, Secretary.

STATE OF MARYLAND, City of Baltimore, } ss:

On this eleventh day of March A. D., 1903, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Chas. A. Webb, vice president, and Samuel H. Shriver secretary, of the American Bonding Company of Baltimore, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

[Seal of Millard Leonard, Notary Public, of Baltimore City.]

MILLARD LEONARD,
Notary Public.

333 STATE OF OHIO, County of Hamilton, } ss:

On this 21st day of December before me personally appeared the Cincinnati, Portsmouth, Bog Sandy & Pomeroy Packet Company by F. A. Laidley, treasurer and general manager, to me known to be the person described in, and who executed the foregoing bond, and acknowledged that he and it executed the same as their free act and deed.

[Notarial Seal, Hamilton Co., O.]

EDW. MOULINIER,
Notary Public, Hamilton County.

I hereby approve the foregoing bond and surety this 22d day of December 1904.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

334 [Endorsed:] No. 8708. Supreme court of Ohio. The Cincinnati Portsmouth Big Sandy & Pomeroy Packet Co. pl'ffs in error *vs.* George W. Bay & Wm. Bay def'ts in error Supersedeas bond to take case to the Supreme Court of the United States Filed, supreme court of Ohio. Dec. 22 1904 L. E. Emerson, clerk Lincoln, Stephens & Lincoln, attorneys for —.

335 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to George W. Bay and William Bay, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within 30 days from the date hereof pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Ohio wherein The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company is plaintiff in error and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the supreme court of the State of Ohio this 23rd day of December, A. D. 1904.

WILLIAM T. SPEAR.
Chief Justice of the Supreme
Court of the State of Ohio.

Attest:
LAWSON E. EMERSON,
Clerk of the Supreme Court
of the State of Ohio.

CINCINNATI, OHIO.

I, attorney of record for the defendants in errror in the above entitled cause hereby acknowledge due service of the above
336 citation.

LAWRENCE MAXWELL, JR.,
Attorney for George W. Bay and William Bay.

December 26, 1904.

337 [Endorsed:] The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co., pl'ff in error *vs.* George W. Bay & William Bay, def'ts in error Citation Filed, supreme court of Ohio Dec. 23 1904 L. E. Emerson, clerk.

338 Supreme Court of the State of Ohio.

STATE OF OHIO,
City of Columbus. }

I, Lawson E. Emerson, clerk of the supreme court of Ohio, do hereby certify that the foregoing petition for writ of error, assignments of error, order allowing writ of error, bond, writ of error, citation and acknowledgment of receipt of copy of same by attorney for defendant in error and opinion of the circuit court of Lawrence county,

Ohio, are the original papers filed in this court in the case of The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, plaintiff in error, against George W. Bay and William Bay, defendants in error; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said supreme court and used in the consideration of said cause, and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said supreme court this 18th day of January, A. D., 1905.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

339 In the Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus. }

To the honorable the Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson clerk of the supreme court of Ohio, have set my hand and seal of said court, this 18th day of January, A. D., 1905.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

340 Supreme Court of the United States.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & Pomeroy Packet Company, Plaintiffs in Error,
vs.
GEORGE W. BAY and WILLIAM BAY, Defendants in Error.
} Number 524, October Term, 1904.

Now comes the plaintiff in error, above named, and, in compliance with paragraph nine of rule ten, of this court, files this statement of the errors on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof.

I. The errors on which it intends to rely are the following:

1. The court erred in holding and deciding against the claim of the plaintiff in error, that the contract sued upon by the defendants in error was not illegal under the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1896, and commonly called the "Sherman anti-trust act," and in holding and deciding against the rights and immunities claimed by the plaintiff in error under said "Sherman act."

2. The court erred in holding and deciding that the contract sued upon in this action was legal and valid and that the plaintiff in error was liable under said contract, notwithstanding the provisions of said act of Congress commonly known as the "Sherman anti-trust act" aforesaid, which was called to the attention of the court.

3. The court erred in holding and deciding that the contract sued upon by the defendants in error was not in illegal restraint of
341 trade or commerce among the States and not invalid and void as such but was valid and enforceable.

4. The judgment of said supreme court of the State of Ohio was contrary to law.

5. The judgment of said the supreme court of the State of Ohio was for the defendants in error when it should have been given and rendered for the plaintiff in error.

6. Said supreme court of the State of Ohio erred in affirming the judgment of the circuit court of Lawrence county, Ohio.

II. The parts of the record which the plaintiff in error thinks necessary for the consideration of said errors, are the following, the paging, where given, being that of the printed record in the supreme court of Ohio, and certified to this court as part of the record in this case.

1. The petition of the plaintiffs in the court of common pleas of Lawrence county, pages 1 to 3, inclusive.

2. The answer and cross-petition of the defendant, pages 3 to 5, inclusive.

3. The reply and answer to the cross-petition, pages 5 to 6.

4. The motion for a new trial, filed by the defendants, page 7.

5. The judgment of the court of common pleas, uncluding the order over-ruling the motion for a new trial and allowing the bill of exceptions, pages 6 and 7.

6. The testimony of William Bay, plaintiff, pages 8 to 24, inclusive.

7. The testimony of Captain Martin, pages 58 to 65, inclusive.

8. The testimony of Captain Laidley, pages 74 to 85, inclusive.

9. Exhibit "A" to the bill of exceptions, found on page 87.

342 10. Exhibit "S," page 288.

11. Exhibit "T," being the contract sued upon, pages 288 to 291, inclusive.

12. The petition in error, filed in the circuit court of Lawrence county, pages 292 to 293.

13. The journal entries or judgments and orders of the circuit court on the first hearing, pages 294 to 295.
14. The bill of exceptions filed in the circuit court, together with Exhibit "A" thereto, pages 293 to 294.
15. The first petition in error, filed in the supreme court of Ohio, pages 296 to 297.
16. The judgment and mandate of the supreme court of Ohio on the first petition in error, page 298.
17. The judgment of the circuit court of Lawrence county on the second hearing, pages 298 to 299.
18. The opinion of the circuit court of Lawrence county on the second hearing.
19. The second petition in error in the supreme court of Ohio, pages 300 and 301.

All orders and judgments of the supreme court of Ohio and all other parts of the record thereafter following, to wit:

20. The judgment of the supreme court of Ohio on the second hearing.
21. The entry of certification made by the supreme court of Ohio, that the plaintiff in error insisted that the contract sued upon by the defendants in error was illegal and void under the "Sherman anti-trust act," etc.

343 22. The petition for a writ of error addressed to the chief justice of the supreme court of Ohio, and allowance thereof by him.

23. The assignment of errors filed in the supreme court of Ohio.
24. The order allowing the writ of error and approving the bond offered by the plaintiffs in error.
25. The supersed*ious* bond executed by the plaintiff in error and approved by the supreme court of Ohio.
26. The writ of error from the Supreme Court of the United States to the supreme court of Ohio.
27. The citation to the defendants in error and the acknowledgment of service thereof by their counsel.
28. Any other orders of the supreme court of Ohio or other proceedings therein or in the Supreme Court of the United States.

LEDYARD LINCOLN,
Of Counsel for Plaintiff in Error.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET CO.,
Plaintiff in Error,

By LEDYARD LINCOLN,
Its Attorney.

344 [Endorsed:] 524 October term, 1904. Supreme Court of the United States. The Cincinnati Portsmouth Big Sandy & Pomeroy Packet Company plaintiffs in error *vs.* George W. Bay & William Bay, defendants in error. Statement of errors plaintiff

in error intends to rely upon & the parts of the record it thinks necessary for the consideration thereof under rule 10 ¶ 9.

345 [Endorsed:] File No. 19,624 Supreme Court U. S. October term, 1904. Term No. 524 The Cinn. Portsmouth Big Sandy & Pomeroy Packet Co. P. E. *vs.* George W. Bay *et al.* Statement of errors & designation by plaintiff in error of parts of record to be printed. Filed April 22d, 1905.

346 Supreme Court of the United States.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & Pomeroy Packet Company, Plaintiff in Error, *vs.* GEORGE W. BAY and WILLIAM BAY, Defendants in Error.	Number 524, October Term, 1904.

I acknowledge receipt, on behalf of the defendants in error, above named, of a copy of the statement of the errors on which the plaintiff in error intends to rely and of the parts of the record which it thinks necessary for the consideration thereof under paragraph 9 rule 10 of the Supreme Court.

Cincinnati, April 21, 1905.

LAWRENCE MAXWELL, JR.,
Counsel for D'f'ts in Error.

347 [Endorsed:] File No. 19,624. Supreme Court U. S. October term, 1904 Term No. 524 The Cinn. Portsmouth Big Sandy & Pomeroy Packet Co. P. E. *vs.* George W. Bay *et al.* Proof of service of statement & designation Filed April 26", 1904.

Endorsed on cover: File No. 19,624. Ohio supreme court. Term No. 174. The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, plaintiff in error, *vs.* George W. Bay and William Bay. Filed February 1st, 1905. File No. 19,624.

In the Supreme Court U. S.
Oct. T., 1905.
FILED.

Supreme Court of the United States

OCTOBER TERM, 1905.

THE CINCINNATI, HAMILTON, AND DAYTON RAILWAY COMPANY,
Plaintiff in Error,
vs.
GEORGE W. RAY AND WILLIAM RAY,
Defendants in Error.

No. 174.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

LEDYARD LINCOLN,
JULIUS L. ANDERSON,
of Counsel.

Supreme Court of the United States.

THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY,
Plaintiff in Error,
AGAINST
GEORGE W. BAY AND WILLIAM BAY,
Defendants in Error.

No. 174,
October Term, 1905.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT.

This is a writ of error to the judgment of the Supreme Court of Ohio. The jurisdiction of this court is based on Section 709, Revised Statutes of the United States.

The action was brought by the defendants in error in the Common Pleas Court of Lawrence County, Ohio, was taken on error from that court to the Circuit Court of Lawrence County, and on error from the latter court to the Supreme Court of Ohio. The action is for the recovery of money under a contract or agreement, "Exhibit T," which is set forth in full on pages 30 and 31 of the transcript of the record. This contract was offered in evidence by the defendants in error at the outset of the case (see record, page 6). The plaintiff in error claims that it is illegal

and unenforceable as contravening the provisions of the Act of Congress approved July 2, 1890, commonly known as the Sherman Anti-trust Act; that such illegality appears on the face of the contract, and that no court deciding the case could do so without either holding said contract to be legal or disregarding the Act of Congress.

The contract was entered into November 26, 1895, between the Portsmouth and Pomeroy Packet Company, a corporation under the laws of Kentucky (hereinafter called the Portsmouth Company), and the two Bays, George and William, parties of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, a corporation under the laws of Ohio (hereinafter called the Big Sandy Company), party of the second part, and its provisions are framed to accomplish two distinct objects, for separate considerations paid, namely, the sale of certain steamboats and other personal property and the suppression of competition, not only between the vendor and vendee of the steamboats, but between the vendee and strangers. Taking the provisions in their order we find: (1) a sale of ceratin steamboats, barges and coal flats and certain stock in a wharfboat company by the parties of the first part to the party of the second part for a lump sum of Thirty Thousand, Five Hundred ($30,500.00) Dollars paid the parties of the first part; (2) an agreement by the party of the second part to pay Thirty-six Hundred ($3,600.00) Dollars a year for five years to the Bays (only) subject to the condition, however, that in case opposition (by any one) should arise between certain points in the Ohio River of such character as to cause the Big Sandy Company to carry freight and passengers at exceedingly low rates, such as (giving examples), then the time of payment of such yearly installments should be deferred until such opposition ceased; (3) an agree-

ment that if the opposition continued without interruption for two years, etc., said agreement could be cancelled at the option of the Bays, all annual payments then unpaid to be forfeited; (4) an agreement that neither of the parties of the first part should for five years be engaged directly or indirectly in running and operating or in any way interested in freight and passenger or packet business, or either of them, between certain points, with the proviso that the parties of the first part might engage in the towing and barge business so long as it in no way interfered with the freight and passenger business of the party of the second part between certain points; (5) an agreement by the party of the second part to maintain the rates charged by the party of the first part on business above Portsmouth, said rates, however, never to exceed railroad rates between said points.

All the parties to this contract had before the execution thereof been engaged in interstate commerce, that is, in commerce between the States of Ohio, Pennsylvania, West Virginia and Kentucky, and the commerce which the parties of the first part agreed under subdivision 4 not to engage in for five years, directly or indirectly, was interstate commerce, being at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points, and at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points, and at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to and for points below Portsmouth, Ohio. The testimony shows that the intermediate points included a number of points in the State of Kentucky.

The original petition (Record, p. 1) alleges that prior to this contract the Portsmouth Company had been in business as a river transportation company between Cincinnati, Ohio, Pitts-

burg, Pennsylvania and Charleston, West Virginia; that the Bays were superintendent and treasurer of said line, and had been for many years engaged in the steamboat business on said route and had a large acquaintance and good will and were owners of stock in said Portsmouth Company. It then sets out the sale (clause 1 of the contract) of the steamboats, barges and coal flats situated at different points in Ohio, Kentucky and West Virginia, "all of which property belonged to the Portsmouth and Pomeroy Packet Company," and of Five Hundred ($500.00) Dollars in the stock of the Wharfboat Company, "which belonged to said William Bay, in consideration of Thirty Thousand, Five Hundred ($30,500.00) Dollars." It then sets forth the agreement (clause 4 in the contract) of the Portsmouth Company and of the Bays not to engage or be interested for five years in freight or passenger packet business between Cincinnati, Ohio, and Portsmouth, Ohio, and intermediate points, or at and from Syracuse, Ohio, or points between Syracuse and Portsmouth to or for points below Portsmouth, Ohio, "in consideration whereof," the petition says, "the defendant," (the Big Sandy Company) "in addition to said purchase price of Thirty Thousand, Five Hundred ($30,500.00) Dollars, agreed to pay the plaintiffs" (the Bays alone) "the sum of Thirty-six Hundred ($3,600.00) Dollars annually, etc.," (clause 2, without, however, setting forth the condition in case opposition should arise); that the defendant has failed to pay the last annual installment due November 26, 1899, and that the plaintiffs and said Portsmouth Company (which is not a party to this action) have duly kept and performed their said contract and all the conditions imposed upon them thereby.

The answer and cross-petition of the Big Sandy Company (Record, p. 3) sets up the condition as to opposition qualifying

the promise to pay $3,600.00 annually (clause 2), and avers that the character of opposition therein provided for had arisen.

The reply (Record, p. 4) admits that the contract contained the conditions set up in the answer, and denies every other allegation thereof.

The pleadings in the Common Pleas Court do not directly raise the question of the illegality of the contract under the Sherman anti-trust act, but that question was necessarily involved in the record, as the plaintiff was seeking to enforce a contract which on its face showed its illegality. The petition in error from the Common Pleas to the Circuit Court of Lawrence County does not specifically allege the illegality of the contract, but several of the assignments of error are sufficiently broad to include the question thus necessarily in the record, as, for instance, the first and fourth (Record, p. 32). The Circuit Court of Lawrence County at first refused to read the testimony, and it was necessary to take the case to the Supreme Court of Ohio to secure a mandate, directing the Circuit Court to consider the bill of exceptions (see record, top of p. 36). When the case was tried the second time in the Circuit Court, the chief question argued was the legality or illegality of the contract, and that question was passed upon by the Circuit Court in its decision, which will be found in this record (see pp. 40-44).

The petition in error from this last judgment of the Circuit Court to the Supreme Court of the State assigns specifically as errors that the court erred: (1) in holding and deciding that the contract sued upon by the defendants in error was not in illegal restraint of trade and invalid and void as such, but was valid and enforceable; (2) in holding and deciding against the claim of the plaintiff in error, that said contract sued upon by the defendants in error was not illegal under the act of

Congress entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and known as the "Sherman Act," an in holding and deciding against the rights and immunities claimed by the plaintiff in error under said "Sherman Act" (Record, p. 37). The Supreme Court of the State affirmed the judgment of the Circuit Court without opinion, but made an entry of certification (Record, p. 39) as part of the record in the case, and of the judgment and entry of affirmance theretofore rendered, "that in the prosecution of error from the Circuit Court of Lawrence County, Ohio, and in the arguments, both oral and by brief, made in this court on behalf of the plaintiffs in error, it was insisted and relied upon by said plaintiff in error that the contract sued upon by the defendants in error was illegal and void under the act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly called 'the Sherman anti-trust act,' as being in illegal restraint of interstate trade and commerce, and providing for an illegal combination or conspiracy in restraint of such trade and commerce, and for an unlawful monopoly of a part of such trade and commerce within the meaning of said act of Congress; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to said plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein."

"It is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case could be had."

The general question involved in the case at bar, and the only question presented upon this argument is whether the

contract sued upon was illegal as contravening the Sherman anti-trust act, and therefore unenforceable.

II.

ERRORS ASSIGNED.

These will be found beginning on p. 48 of the record. The errors asserted and intended to be urged are as follows:

(1) The Court erred in holding and deciding against the claim of the plaintiff in error that the contract sued upon by the defendants in error was not illegal under the act of Congress entitled: "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and commonly called the "Sherman anti-trust act," and in holding and deciding against the rights and immunities claimed by the plaintiff in error under said "Sherman act."

(2) The court erred in holding and deciding that the contract sued upon in this action was legal and valid, and that the plaintiff in error was liable under such contract, notwithstanding the provisions of said act of Congress, commonly known as the "Sherman anti-trust act" aforesaid, which was called to the attention of the court.

(3) The court erred in holding and deciding that the contract sued upon by the defendants in error was not in illegal restraint of trade or commerce among the states, and not invalid as such, but was valid and enforceable.

(4) The judgment of said the Supreme Court of the State of Ohio was contrary to law.

(5) The judgment of said the Supreme Court of the State of Ohio was for the defendants in error when it should have been given and rendered for the plaintiff in error.

(6) Said Supreme Court of the State of Ohio erred in affirming the judgment of the Circuit Court of Lawrence County, Ohio.

III.

POINTS OF LAW OR FACT.

The Sherman anti-trust act is entitled "An act to protect trade commerce against unlawful restraints and monopolies," and was approved July 2, 1890. Section 1 contains the following: "Every contract combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal." The remainder of the section as well as Section 2 provide that every person who shall make any such contract or engage in any such combination or conspiracy and every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and punished as provided in the sections.

The other sections are in line with the policy indicated in those recited. We note in passing that Section 8 of the law provides that the word "person" or "persons" wherever used in the act shall be deemed to include corporations or associations.

The language of this statute is clear and unambiguous. It condemns "*every* contract, combination or conspiracy in restraint of trade or commerce among the several states," and makes guilty of a misdemeanor "*every* person who shall monopolize *or attempt to monopolize* or combine or conspire with any person or persons to monopolize *any part* of the trade or commerce among the several states," etc.

The framers of this act were acquainted with the rule of the common law permitting certain reasonable restraints upon trade, and if they had intended to confine themselves within the limits of those rules they would have used apt words to accomplish their purpose. From the earliest time the common law set its face against restrainsts of trade as against public policy. Such restraints have always remained presumptively invalid and unenforceable, though in course of time exceptions have been engrafted on the general law. In this country, though perhaps not in England, the common law has also condemned restrictions on free competition and contracts tending to a monopoly, in cases where the doctrines in respect to contracts in restraint of trade have no application. The act of Congress was so worded, it would seem intentionally, as to cover both classes of cases and to extend or enlarge the common law doctrines without recognizing its exceptions.

Repeated attempts have been made to restrict the broad and general language of the statute, but the federal courts and especially this court have uniformly held that the act means just what it says and cannot be confined to unreasonable restraints nor such as were condemned by the common law before its passage.

United States v. Trans-Missouri Freight Assn., 166 *U. S.* 290; 312-313, 327, 328, 334-335, 340-341.

United States v. Joint Traffic Assn., 171 *U. S.* 505; 573-575.

United States v. Addyston Pipe & Steel Co., 85 *Fed. Rep.* 271; 278.

Same case affirmed in 175 *U. S.* 211.

Northern Securities Co. v. United States, 193 *U. S.* 197; 331, 402.

Chesapeake & Ohio Fuel Co. v. United States, 115 *Fed. Rep.* 610; 619.

The contract in the case at bar offends against the first and second sections of the Sherman act because it is both a contract and a combination in restraint of trade or commerce among the several states and constitutes an attempt to monopolize a part of that trade or commerce.

The parties of the first part, which includes not only the Portsmouth Company, owner of the steamboats Henry M. Stanley, the Lizzie Bay and other water craft sold, but also the two Bays, who appear by the evidence (Record, pp. 6-11) to be the owners of still other steamers not sold (the Ruth, the Chevalier, the Urania), agree not to engage directly or indirectly for five years in running or operating or to be in any way interested in any freight or passenger or packet business or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points, or at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points, or at and from Syracuse, Ohio, and points between Syracuse and Portsmouth to or for points below Portsmouth, Ohio, (Record, p. 31).

This was a direct restraint upon trade and commerce in that it removed entirely for the time from trade and commerce on a part of the river, persons who, the testimony shows, were capable of engaging in such trade and commerce and had theretofore actually been engaged therein, as also the steamboats owned by the Bays and not sold to the Big Sandy Company.

The commerce so restrained was interstate. The petition alleges that both the Portsmouth Company and the Bays were at and prior to the contract engaged in steamboating between Pittsburg, Pennsylvania, Charleston, West Virginia, and Cincinnati, Ohio. The testimony of William Bay, as well as the other evidence, shows what is a matter of common knowledge, that the points intermediate between Portsmouth and Cincin-

nati spoken of in the contract included several in Kentucky, as, for example, Maysville and Augusta.

It cannot be questioned that the transportation of persons and property from one state to another is interstate commerce.

United States v. Trans-Missouri Freight Assn., 166 *U. S.* 290; 312, 325.

Gloucester Ferry Co. v. Pennsylvania, 114 *U. S.* 196.

See review of cases involving the definition of commerce in *Lottery Case*, 188 *U. S.* 321; 345-352.

The transportation of goods on a through bill of lading from one point in a given state to another in the same state by way of an adjoining state or territory is interstate commerce.

Hanley v. Kansas, 187 *U. S.* 617.

The states of Kentucky and West Virginia extend to low water mark on the Ohio side, so that even boats plying directly from Syracuse to Cincinnati without stopping at intermediate points would necessarily at ordinary stages of the river pass through parts of West Virginia and Kentucky.

Indiana v. Kentucky, 136 *U. S.* 479.

Hanley v. Anthony, 5 *Wheaton*, 374.

Booth v. Hubbard, 8 *O. S.* 243, 247.

McFall v. Commonwealth, 2 *Metcalf* (*Ky.*) 394.

But the contract not only contained an agreement on the part of the Portsmouth Company and the Bays not to engage in such commerce, but also other provisions whose evident purpose and effect was to prevent or crush competition by *strangers* to the contract. It provided that "In case of opposition to the boats of the party of the second part by other boats running from Cincinnati, Ohio, to Portsmouth, Ohio, or from Cincinnati to points above Portsmouth, not including points above Syracuse, Ohio, causing the party of the second part to carry freight and

passengers at exceedingly low rates, such as, etc., the time of payment of said yearly installments of Thirty-six Hundred Dollars ($3,600.00) shall be deferred during the period of such opposition and until the same has ceased, when said payments shall be made and be resumed," etc.

In other words, the Big Sandy Company were paying for a river free of serious competition *by any one*—for a virtual monopoly of the carrying the trade between certain points. As long as they were unmolested in the enjoyment of such monopoly they were willing to pay, but as soon as competition of the kind named arose, from any source, the payments were to be suspended. It would then become the interest of both parties to crush out the competition. Presumably the Big Sandy Company could make more than $3,600.00 a year or $10.00 a day if it had no opposition, or it would not have made the contract. It was therefore interested in cutting rates so as to destroy any competitor—the sooner the better. And the Bays became accessory to the slaughter by agreeing to defer payment of the principal sum of $3,600.00 a year, which carried with it a remission of interest.

The next clause of the contract provides that if the opposition should continue for two years then the Bays had the option to cancel the contract, in which event they would forfeit all unpaid annual installments. This made the Bays the sole arbiters as to how long beyond the two years the Big Sandy Company should continue the process of crushing out opposition.

Surely these provisions are in restraint of trade and commerce and in furtherance of an attempt at monopoly quite as much as the agreements in the Trans-Missouri Freight and the Joint Traffic cases, which merely provided for a conference between competing lines of railroad and the maintenance of

reasonable rates to be fixed by representatives of the various roads. Any contract which interferes with natural and healthy competition between carriers engaged in interstate commerce, and whose aim and purpose is to prevent or crush such competition and produce a monopoly in any part of such commerce is clearly within the statute.

But the contract also contains the very kind of agreement that was involved in the Trans-Missouri, Joint Traffic and other federal cases cited. For the Big Sandy Company agrees (Record, p. 31) to maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points. This is agreeing to maintain rates in the fixing of which you have no voice.

Prior to the making of the contract the only competition which the Big Sandy Company had between Portsmouth and Cincinnati was that of the Portsmouth Company and the Bays. The Pittsburg line, plying between Pittsburg and Cincinnati, did not cut rates or compete with the Big Sandy Company. After the contract had been in force for several years, in March, 1899, opposition arose between the points named, first by the Avalon which was run by Captain Kramer, of Parkersburg, later by the Charles B. Pierce and M. B. Wells, run by the Edgingtons, and afterwards by the Urania, run by a son of the plaintiff, William Bay, under his direction (see Record, pp. 10, 11, 14-16). The parties, however, had at the time the contract was made the reasonable expectation that if the Portsmouth Company and the Bays would cease to compete, the Big Sandy Company would have a free hand, at least between Cincinnati and Portsmouth, and Captain Laidley testifies (p. 22) that he bought out the Portsmouth Company and the Bays to stop opposition.

It has been held by this court in a number of cases involv-

ing contracts which did not relate *directly* to interstate commerce, but were local in their nature, that they were not within the prohibition of the Sherman act, although the parties contracting in fact sold commodities or solicited business beyond the state line, but the contract must affect interstate commerce *directly* and not *remotely* or *incidentally*.

United States v. E. C. Knight, 156 *U. S.* 1.
Hopkins v. United States, 171 *U. S.* 578.
Anderson v. United States, 171 *U. S.* 604.

But in the case of the *United States against the Freight Association*, 166 *U. S.* 290, *at* 325, the court uses the following language:

"Transportation of commodities among the several states or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the states or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them or upon contracts relating to them may be somewhat difficult to determine, *but interstate transportation presents no difficulties.*"

It is not necessary that the restraint upon trade should be entire, or the monopoly aimed at, complete. In the case of the United States against E. C. Knight Co., 156 U. S. at page 16, the Chief Justice says:

"Again, all the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

And in the case of the Addyston Pipe & Steel Co. against the United States, 175 U. S., 211, at 244-5, the court say:

"Total suppression of the trade in a commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way as well as its effect upon the volume or extent of the dealing in the commodity that is regarded. All the facts or circumstances are, however, to be considered, in order to determine the fundamental question—*whether the necessary effect of the combination is to restrain interstate commerce.*"

See also Northern Securities v. U. S., 193 U. S. at p. 407.

It was claimed, however, in the court below, that, where there is a sale of property, accompanied by an agreement on the part of the vendor, not to engage in the business in which the property was used, for a limited period of time and within a limited territory so that the contract would have been considered a reasonable one and enforceable at common law, such case must be construed an exception to the comprehensive language of the Sherman Act; and for this proposition several dicta of Mr. Justice Peckham in the Trans-Missouri and Joint Traffic cases, as also in the case of Bement vs. The National Hardware Co. were cited. We shall contend later in this brief that the covenants in restraint of trade or commerce in the agreement in question, which we have set forth, were not incidental to the sale of the steamboats or such as would have been sustained at common law. But we submit that the dicta can not be applied in cases where the *direct and necessary effect* of the covenant is to restrain interstate commerce or the transportation of persons and property from one state to another.

In the U. S. vs. The Freight Ass'n, 166 U. S. at p. 329, Mr. Justice Peckham says:

"A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question."

He is discussing the "theory" of the U. S. Circuit Court of Appeals whose judgment he reversed, which was expressly that

"The contracts, combinations in the form of trust or otherwise and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the Act of July 2, 1890, entitled 'an act to protect trade and commerce against unlawful restraints and monopolies' are the contracts, combinations and conspiracies in restraint of trade, that had been declared by the courts to be against public policy and void under the common law before the passage of that act." (See U. S. vs. Trans-Missouri Freight Ass'n, 58 Fed. Rep. at p. 58, third syllabus.)

And developing the theory of the lower court, he makes the remark quoted, not by way of deciding the proposition involved, but by way of stating the argument of the inferior court, and he adds, immediately:

"But we can not see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it."

There is no more reason for believing that the Sherman Act makes an exception in the case of restrictive covenants which are the mere accompaniment of the sale of property, than in the case of other covenants valid at common law and the judicial legislation in which the court decides it can not indulge (166 U. S. p. 340) would be just as necessary to incorporate in the act the exception claimed as any other. The dictum will not be given such a construction as would destroy the basis of the decision itself, which was that the language of the statute is clear and unambiguous and that no exception founded upon the common law can be read into it. See also p. 334-5.

In the Joint Traffic Association case 171 U. S. at p. 568, Mr. Justice Peckham says:

"The sale of the good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act."

He is considering the claim of counsel "that Congress is without power to prohibit generally all contracts in restraint of trade and the effort to do this invalidates the act in question." He takes up what he calls a "formidable list" made by counsel, of contracts rendered illegal by this construction of the act, none of which directly or necessarily restrain commerce or trade among the states, but all of which, though having the effect of somewhat restraining trade and commerce, are claimed to be indispensable to the freedom guaranteed by the Fifth Amendment, and among them the sale of the good will of a business with an agreement not to destroy its value by engaging in a similar business.

But the language immediately following the last quotation again shows that the learned Justice only had in mind agree-

ments that did not directly or necessarily restrain interstate trade or commerce for he says:

"The instances cited by counsel have in our judgment little or no bearing upon the quotation under consideration. In Hopkins vs. United States decided at this term, post 578, we say that the statute applies only to those contracts *whose direct and immediate effect is a restraint upon interstate commerce* and that to treat the act as condemning all agreements under which as a result, the cost of conducting interstate commercial business may be increased, would enlarge the application of the act beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce is not as we think covered by the act, although the agreement may indirectly and remotely affect that commerce."

Certainly the Trans-Missouri and Joint Traffic cases have not been considered as introducing any exception in the Sherman Act based on the doctrines of the Common Law; but quite the contrary.

In the case of U. S. v. The Addyston Pipe & Steel Co., 85 Fed. R., Judge Taft, speaking for Circuit Justice Harlan and for Circuit Judge Lurton and himself, says at page 278:

"The contention on behalf of defendants is that the association would have been valid at common law and that the federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the Supreme Court of the United States in U. S. v. The Trans-Missouri Freight Association, 166 U. S. 290, in which it was held that con-

tracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction—a question we do not decide—it is certain that, if the contract of association which bound the defendants was void and unenforceable at common law, because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate."

And therefore he proceeds to consider whether the contract in question in that case would have been valid at common law, and gives a masterly review of the development of the common law doctrines to which we will have occasion to refer later.

Again in the case of the Chesapeake & Ohio Fuel Company v. U. S. 115 Federal Reporter, 619, the same court had occasion to consider, whether the Sherman Act could be restricted by borrowing from the common law, and the Court speaking by Mr. Justice Day, now of this court, says at page 619:

"In the exercise of this right Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal, if in restraint of trade or commerce among the states. U. S. v. Trans-Missouri Freight Association 166, 290; U. S. v. Joint Traffic Ass'n. 171 U. S. 505; Addyston Pipe & Steel Co. v. U. S. 175 U. S. 211."

And on page 622 the court says:

"But it is to be remembered that the test of the common law as to the reasonableness of the restraint of commerce is not the test of the validity of such agreements within the provisions of the statute. This proposition was decided by the Supreme Court in the Trans-Missouri case *supra*, and affirmed in later cases."

In the case of Lufkin Rule Co. v. Fringeli 57 O. S. at p. 607, this court said:

"And in 1890 the Congress of the U. S. passed an act known as the Sherman Law to protect trade and commerce against unlawful restraints and monopolies. In construing this act, the Supreme Court in U. S. v. Freight Ass'n. 166 U. S. 290, 328, held that under its provisions any restraint of trade affecting interstate trade and commerce of the United States is invalid. It had been claimed in argument that it only included such contracts in restraint of trade as were unlawful at common law."

In the case of the Monongahela River Consolidated Coal & Coke Company v. Jutte, reported in 210 Pa. St. R. 288, the Supreme Court of Pennsylvania had before it a case in which there was a sale of a business and its good will, accompanied by an agreement on the part of the vendor not to engage in the same business within a limited time, and a "limited territory," i. e., on the Monongahela, Ohio and Mississippi Rivers. The vendor did engage in the business notwithstanding his agreement, and suit was brought upon the covenant. The Supreme Court, while holding the covenant to have been reasonable and valid at common law, and under the public policy of Pennsylvania, held, in obedience to the decisions of this court that, so far as interstate commerce was concerned, it offended against the Sherman Anti-

Trust Act, and was therefore not enforceable to that extent. See page 306.

In the 74th American State Reports, pages 235 to 273, will be found a long note on restraints of competition, and monopolies, at the end of which pages, 272-273, the learned annotater considers briefly the Sherman Anti-Trust Act. He says:

"The Federal Anti-Trust Law, which furnishes the best example of this, is aimed not only at the combinations which restrict competition and form monopolies, but by its terms is directed against any and all restraints on trade. So far as ordinary contracts in restraint of trade are concerned, the common law had already worked out just and equitable doctrines, and this branch of the subject could have been wisely omitted from the statute. But by reason of the confusion of the two doctrines, of ordinary restraints on trade and of restrictions to competition, to which we have already called attention, the Federal Law was framed, so as to include both. In consequence the courts have been compelled to hold that the act aims at all restraints upon trade, however reasonable they may be, and whether their tendency is to form a monopoly or not. Under the Federal Act, it would seem that if the business concerns inter-state and foreign commerce, the ordinary sale of a business, with the usual covenants against the vendor, preventing him from conducting a similar business, would be an illegal restraint of trade, however reasonable the restriction might be, and however necessary to preserve to the vendee the legitimate fruits of his purchase. Such a result was certainly never intended and it may be unfortunate that it has been accomplished: See the *United States v. Trans-Missouri*, 166 *U. S.*, 290; *United States v. Coal Dealers' Ass'n.*, 85 *Fed.* 252; *United States v. Hopkins*, 82 *Fed.* 529."

We give the last quotation as the testimony of a reluctant witness to his construction of the Trans-Missouri and other Federal cases. He evidently would have been glad to seize upon the

dicta referred to, if he could have satisfied himself that these decisions recognize an exception in the case supposed.

In the case of Bement v. National Harrow Co., 186 U. S. 71, at page 92, Mr. Justice Peckham says:

"But that statute clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

This, as the whole decision shows, is because a patent right is a legal monopoly, guaranteed by letters patent, issued under the statutes and law of the United States.

In the case of the *Northern Securities Company v. The United States*, 193 *U. S., at page* 361, Mr. Justice Brewer, while agreeing with the results reached in the majority opinion, and while still maintaining that the Trans-Missouri Freight Ass'n. and Joint Traffic Association cases were correctly decided, expresses the opinion that in some respects the reasons given for the judgments in those cases cannot be sustained. He says further:

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions of the common law had affirmed were reasonable and ought to be upheld. The purpose, rather, was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy."

Mr. Justice Holmes, while not concurring with the majority, says, at page 405, in speaking of these cases:

"I accept those decisions absolutely, not only as binding

upon me, but as decisions *which I have no desire to criticise or abridge.*"

And he not only does not limit the statute to contracts in restraint of trade, which are unreasonable, and which are therefore invalid at common law, but he repeatedly declares that the act strikes at "*every*" contract, combination, or conspiracy in restraint of trade between the states, and at "*every*" person who shall monopolize or attempt to monopolize "*any part*" of such trade.

But Mr. Justice Holmes brings out clearly a distinction which can be applied with profit in the consideration of the case at bar, namely, between *contracts* and *combinations* in restraint of trade. The former he defines (p. 404) to be "contracts with a stranger to the contractor's business (though in some cases carrying on a similar one) which wholly or partially restricts the freedom of the *contractor* in carrying on that business as otherwise he would." In these the trade restrained is the contractor's own. The latter are "combinations to keep strangers to the agreement out of the business." The objection to them is not their effect on the parties making the contract, but in their intended effect upon strangers and their supposed effect upon the public at large. They were considered contrary to public policy because they monopolized or intended to monopolize some portion of the trade or commerce of the realm. (See also p. 409.)

The Trans-Missouri and Joint Traffic cases he points out (p. 405) were cases of *contract* in restraint of trade.

It is to such *contracts* alone that the dicta of Mr. Justice Peckham (166 U. S. at p. 329, 171 U. S. at p. 368) and of Mr. Justice Brewer (193 U. S., at p. 357) can apply, even if we con-

strue them as counsel do and read them into the anti-trust act as an exception to its broad and uncompromising language. "A contract which is the mere accompaniment of the sale of property and entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale," to use the language of Mr. Justice Peckham in the first case, would not fall within the definition given by Mr. Justice Holmes of a *combination* in restraint of trade whose object and purpose is to prevent *strangers* to the combination from competing with it in some part of its business.

In the case at bar we have both a contract in restraint of trade, limiting the contractor's own business, and a combination in restraint of trade affecting strangers. The main purpose of the contract was to suppress or prevent competition by strangers as well as the party of the first part and give the Big Sandy Company a monopoly in the river between Portsmouth and Cincinnati. The Bays not only agreed themselves to withdraw from that part of the river, but to furnish the Big Sandy Company compensation (in the remission of the $3,600.00 a year and interest) during the cutting of rates necessary to drive strangers off that part of the river, and they reserved to themselves the option of saying whether such cutting of rates below the possibility of making money should continue longer than two years. As part consideration, however, for retiring from the trade below Portsmouth and agreeing to forego the payment of $3,600.00 during opposition, they required the Big Sandy Company to maintain such rates on business above Portsmouth as they should prescribe, not exceeding railroad rates.

The Act of Congress certainly does not permit contracts in restraint of trade that would be unreasonable and illegal at com-

mon law. The test at common law as stated by Tindall, C. J., in the leading case of *Horner v. Graves*, 7 *Bingham*, 735, *at* 743, was:

"Whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given and not so large as to interfere with the interests of the public; whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and if oppressive it is in the eye of the law unreasonable."

See also 24 *Am. & Eng. Enc. of Law, pp.* 850, 851.

We submit that the provisions of the contract in the case at bar, especially those looking to a suppression of competition by strangers, go far beyond the fair protection of the Big Sandy Company.

In Ohio it is well settled that all restraint of trade is presumptively invalid; that a partial restraint may be enforced only where it appears that it is founded upon a valuable consideration and is reasonable and not oppressive.

Lange v. Work, 2 *O. S.* 519; 528.

See also *Lufkin-Kulc v. Fringeli*, 57 *O. S.* 596.

In the latter case the Court say at p. 602:

"It is the well settled rule in this state that all agreements against any general restraint of trade are against public policy and void; but it is held that agreements that only impose a partial restraint made in connection with the purchase of a business, that are reasonably necessary to make available the good will purchased with the business and are reasonable and not oppressive may be enforced."

In the case of the *U. S. v. The Addyston Pipe & Steel Company*, 85 Fed. R. 271, the court goes into an exhaustive review

of the authorities in England and this country and groups under five heads the cases where covenants in partial restraint of trade have been upheld, (p. 281), the first of which is the one claimed to be applicable to the case at bar, namely an agreement "by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold," and the Court adds:

"Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership, bought."

And on pages 282 and 283:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it *is merely ancillary to the main purpose of a lawful contract,* and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. . . . This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of

the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee, and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and would therefore be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which, partial restraint is permitted, and by which its reasonableness is measured, but the whole object is to restrain trade in order to avoid competition, which it has always been the policy of the common law to foster."

And on pages 290, 291, the court uses the following language which is applicable to the case at bar:

"In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect and there was no relation of partnership, or of vendor and vendee, or of employer and employee. Where such relation exists between the parties, as already stated, restraints are usually enforceable, if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of

the contract should be to restrain competition. *In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose.* The principal cases of this class are Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102; Arnoe v. Coal Co., 68 N. Y. 558; People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062; People v. Refining Co., 54 Hun. 366, 7 N. Y. Supp. 406; State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; State v. Standard Oil Co., 49 O. S. 137, 30 N. E. 279; Manufacturing Co. v. Klotz, 44 Fed. 721; Distilling & Cattle Feeding Co. v. People, 256 Ill. 448, 41 N. E. 188; Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. 530; Harrow Co. v. Hench, 83 Fed. 36; Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36; Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391.

"In addition to the cases cited, there are others which sustain the general principle, *but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a quasi public employment.* They are Gibbs v. Gas Co. 130 U. S. 396, 9 Sup. Ct. 553; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798; Stockton v. Railroad Co. 40 N. J. Eq. 52, 24 Atl. 964; West Va. Transp. Co. v. Ohio River Pipe-Line Co., 22 W. Va. 600; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; Railroad Co. v. Collins, 40 Ga. 582; Hazelhurst v. Railroad Co., 43 Ga. 13."

The Supreme Court of Ohio and other courts have repeatedly held that contracts in restraint of competition and tending to monopoly are against public policy and void.

Salt Co. v. Guthrie. 35 O. S. 666.

Emery v. Candle Co. 47 O. S. 320.

State v. Standard Oil Co. 49 O. S. 137.

South Chicago v. Calumet. 171 Ill. 391 (a case of competing street railroads).

Anderson v. Jett. 89 Ky. 375 (a case of competing steamboat lines).

Texas v. Southern. 6 Southern 888, 891 (a case of competing railroads).

See long note in 71 Am. State Reports 235-273.

In the last case the Supreme Court of Louisiana says at page 891:

"We reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition either in the market value of commodities or in the carriage or transportation of such commodities are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce."

It does not appear, either in the pleadings or in the evidence, in the case at bar that the contract on the part of the Portsmouth Company or of the Bays not to engage in competing business with the Big Sandy Company between Portsmouth and Cincinnati, was ancillary to the sale of the good will of any business either by the Portsmouth Company or the Bays, or was incidental to the sale of the boats and barges belonging to the Portsmouth Company or was reasonably necessary to the enjoyment by the Big Sandy Company of their purchase of such boats and barges. There is not a word in the contract about the sale of any business or of any good will, nor was the Big Sandy Company authorized to use the name of the Portsmouth Comapny or of the Bays in doing business. The Bays did not go out of business, but appear to have retained the ownership of at least two boats, the "Urania" and the "Ruth." It does not appear that the Portsmouth Company went out of business or sold all its boats.

The covenants restraining the Portsmouth Company and the Bays from doing business between Portsmouth and Cincinnati

are separate and distinct from the sale of the boats and barges by the former; were not for the same consideration as such sale, and the consideration for such covenant was paid to parties other than the owners of the boats and barges, namely, to the Bays. Such covenant could not therefore be an incident to the sale of such boats and barges and could not be necessary to enable the vendors of the boats to get the best price for their property, or the vendee to enjoy the legitimate fruits of its purchase.

Of course the other covenants in the contract looking to a prevention or suppression of competition by the public generally, can not be considered as incidental to the sale of the steamboats or a reasonable condition of such sale.

Indeed, the *main purpose* of the contract was to prevent competition and to secure to the Big Sandy Company a monopoly in that part of the river trade. It appears, affirmatively, that two competing lines could not both make money and therefore one yielded the field to the other and retired to points above Portsmouth, stipulating, however, for the maintenance by the other of such rates as it should establish on business above Portsmouth, not exceeding railroad rates between the same points.

The contract makes the sale of the boats and barges and the various covenants for the suppression of competition, distinct matters for distinct and separate considerations payable to different persons.

Further, it will not escape the observation of the court, that the two packet companies who signed the contract were not engaged in private, but in quasi-public business, and therefore any restraint upon such business would be prejudicial to the public interest and can not be sustained.

See *U. S. v. Freight Ass'n*, 166 U. S. at 333 to 335, and the quotation from case of *Gibbs v. Baltimore*, 130 U. S. 396.

U. S. v. Addyston, 85 Fed., at 291, and cases cited.

It is claimed that the illegality of the contract should have been specially pleaded by the defendant. To this there are two answers. First, that the facts bringing the case within the condemnation of the act of congress and of the common law appear upon the face of the pleadings and are admitted by them. Indeed the petition is demurrable. Second, we submit it is not the law that illegality must be pleaded, where the plaintiff cannot prove his case without disclosing the illegality, as for instance, where it appears upon the face of the contract which is the basis of his cause of action.

The petition shows that the Portsmouth Company and the Bays were engaged in interstate commerce as was also the Big Sandy Company and that the Portsmouth Company and the Bays agreed not to be in any way directly or indirectly engaged in such commerce between certain points on the river, for five years from the date of the contract. It is not shown by the petition, even that the restrictive covenant is a mere incident to the sale of the steamboats; but on the contrary, it appears affirmatively, that the steamboats belonged to the Portsmouth Company and the consideration for the restraint upon commerce was to be paid to the Bays; that this consideration of $3,600 annually was distinct from and in addition to the purchase price of the boats and barges.

Of course it appears on the face of the petition that the parties to the contract were both engaged in a public occupation and that the necessary effect of the fulfillment of the contract, was a detriment to the public.

In the case of Lange v. Werk, 2 O. S., and the Lufkin-Rule Company v. Fringeli, 57 O. S. *supra*, were submitted on de-

murrer to the petition and the demurrer was in each case sustained, because the petition did not affirmatively bring the case within the exceptions at Common Law to the general rule prohibiting all restraints upon trade. In the Lufkin case, one ground of the decision was that the contract tended to a monopoly.

The answer and cross-petition sets up the provision of the contract, providing for the suspension of the annual payments, during opposition by strangers to the contract, the effect of which, we have argued, was to restrain trade or commerce and to promote monopoly, and the existence of those provisions in the contract is admitted by the reply.

The first thing that the plaintiffs did was to offer the contract which of course discloses its illegality. The plaintiffs were necessarily acquainted with the provisions of the contracts when they sued upon the same and cannot claim to have been taken by surprise, because the legal conclusion to be drawn from its provisions was not set up in the answer.

In cases where the illegality of the contract sued upon appears upon the plaintiff's presentation of the case, the court is confronted with the question, whether it will lend its aid to enforce an illegal contract, and out of regard for its dignity and oath of office it is bound to refuse to become a party to a transaction, so tainted. It will therefore refuse to enforce the contract, not out of regard for the defendant or of its rights, but because it will have nothing to do with an unlawful transaction, and will leave the parties where it finds them.

A different question arises of course where the illegality of the transaction is not disclosed upon the face of the contract, as for instance where it bears the mark of a lease, deed or other legitimate transaction. In such cases it may become the duty

of the defendant to call the court's attention to the illegality or the true facts from which it arises.

"In England at common law under the general issue in assumpsit it was always permissible to give in evidence matters showing that the contract in suit was illegal. After the enactment of the Hillary rules illegality of contract was required to be specially pleaded. In the United States where it is not otherwise provided by statute illegality of contract may be shown under the general issue.

"In many states the common law rule has been changed by statute and it is now necessary to plead illegality of contract specially." (4 American & Eng. Ency. of Pleading & Practice, 2d ed. p. 952, citing many cases in notes.)

In the same work is found at p. 844 of Vol. I the following under the head of "Answers in Code Pleadings":

"Illegality of contract. A defendant in order to avail himself of facts not appearing on the face of the contract to establish its invalidity, must plead them."

Mr. Beach, in his work on the Modern Law of Contracts, Vol. II, Sec. 1443, says:

"A contract which is void for want of power to make it under express statutory or constitutional provisions cannot be given validity in any way by a court of equity. The court in the due administration of justice will not enforce a contract in violation of law or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded. . . . . No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to rise *ex turpi causa* or from transgression of a positive law of the country, then the court says he has

no right to relief. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its to such plaintiff."

And again, Section 1740:

"The court in due administration of justice will not enforce a contract in violation of law or permit a plaintiff to recover upon a transaction against public policy even if the invalidity of the contract or transaction be not specially pleaded. When there is nothing on the face of the contract to suggest that it is founded upon an unlawful consideration, the illegality thereof must be pleaded, as a rule, when relied upon as a defense. But if on trial it appears from competent evidence that the cause of action or defense rests upon an immoral agreement, the court of its own motion will refuse to enforce such immoral agreement even should both parties assent to its enforcement." See also Sec. 1417 of the same work.

In *Oscanyan v. Arms Co.*, 103 U. S. 261, a Turkish officer sued the company on an agreement to pay him a commission on a bill of goods sold his government. The record raised several questions, and among them whether the trial judge could direct a verdict against the plaintiff on the opening statement of his counsel disclosing the illegal contract sued on and whether such trial judge erred in holding that the question of the illegality of the contract could be considered not having been specially pleaded. The court says in considering the second point, page 267:

"Assuming for the present that it was a sound one" (i. e., the view that the contract was illegal), "the objection to a recovery could not be obviated or waived by any system of pleading, or even by the expressed stipulation of the parties. It was one which the court itself was bound to raise in the interest of the

due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morals or the law."

In the case of *Emery v. The Ohio Candle Company*, 47 O. S. p. 320, the Candle Company had been a party to a contract in restraint of trade under which it was entitled to certain profits. After remaining in the association for about a year it withdrew therefrom and then sued for its share of the profits. The defense set up seems from the report not to have been the illegality of the contract, but the fact that the plaintiff "by withdrawing before the expiration of the life of the association had violated the agreement and was entitled to none of its gains." The court says at p. 322:

"We are of the opinion that the suit cannot be maintained for the reason that the objects of the association were contrary to public policy and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is in substance a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represented the association and a judgment against them is a judgment against it. If, as claimed, by the defendants, a member could not withdraw from the association until six years had expired, then the committee representing the association had a defense on which they might have relied, had the objects of the association been perfectly legitimate. *But should a court be called upon to consider any defense so long as the claim itself is based upon an agreement to which it can give no countenance.*" And this was incorporated into the syllabus.

In the case of the *Field Cordage Co. v. The National Cordage Co.*, 6 Ohio Cir. Ct. R. 615, the contract sued on bore an in-

nocent exterior, namely, that of a lease of machinery. The action was for rent under the lease. The answer admitted the execution of the lease but alleged that the only consideration to the defendant for said lease was a limitation upon the production of binder twine in the United States and the control by it of the market price thereof; that at the time of its execution it was the understanding of the parties that it was to be a "dead lease," that is that the defendant should not take possession or control of the machinery, but the same should remain in the possession and control of the plaintiff, and did in fact so remain; that to promote said purpose the plaintiff agreed that it would not anywhere manufacture binder twine in excess of the capacity of a certain mill but that defendant (plaintiff) did manufacture binder twine in excess of the capacity of said mill and thereby defeated the object of said contract by preventing the limitation of the amount of said product and the control of the price thereof by the defendant. Wherefore it alleged that said lease was without lawful or other consideration. The trial court allowed the true nature of the contract to be shown, though in form a lease of machinery. The Circuit Court, speaking by Shauck, J., says at page 624-5:

"The trial court was not concerned in ascertaining the rights and duties of parties arising out of a contract confessedly valid (invalid) as against every consideration of public policy. It was chiefly concerned in ascertaining whether the contract had been entered into for purposes which a due regard to the interest of the public forbid. *In its inquiry and judgment it was not even restricted to the issues joined between the parties, for it was its duty to refuse to enforce the contract, even though its validity was not challenged by either party.*"

Several cases were cited by opposing counsel in their briefs in the court below for the proposition that illegality must be

pleaded. These cases will be found on examination to be entirely consistent with the distinction made by us in this brief that where the illegality appears on the face of the contract sued on, or necessarily in the proof of the plaintiff's case, the defendant may avail himself thereof without special pleading. It is where the contract wears an innocent mask or where special affirmative facts are necessary to disclose its illegality that the defendant must plead them. The court will not shut its eyes to that which the plaintiff himself discloses and make itself a party to enforcing a contract confessedly contrary to law or public policy.

In the case of *Millbank v. Jones*, 127 *N. Y.* 370, *at* 375, 376, one of the cases cited by counsel, this distinction is clearly made. The court, speaking by Parker, J., says (p. 375):

"Under a general denial the rule undoubtedly is that if the illegality appears on the face of the complaint or necessarily appears from plaintiff's evidence, advantage may be taken of it by the defendant, who must also be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove in order to make out his cause of action."

And on page 376:

"But in this cause it neither appeared from either the complainant or the evidence presented by the plaintiff that the contract was illegal, and as we have already shown, when the plaintiff rested, the evidence established a cause of action. The general denial put in issue all matters which the plaintiff was bound to prove; nothing more. He was required to prove the contract entered into by the defendant, *which was on its face valid.*"

So in *Matthews v. Leaman*, 24 *O. S.* 615; 621, 622, the deed from Leaman to Boehman appeared on its face to have been given for a valuable consideration. It was claimed in the Su-

preme Court on error to the District Court that it had been executed for an illegal, or rather an immoral consideration. No such issue was apparently raised in the trial court, and it is hard to see how it would have been to the interest of either of the parties to do so. The bill of exceptions merely disclosed that evidence had been introduced *tending* to prove that the deed had been executed without consideration and upon trust to reconvey, and incidentally that the parties had been cohabiting illicitly.

The Supreme Court says that the evidence is not before them; that the bill of exceptions merely shows that there was evidence *tending* to prove the consideration to have been illegal; that unless the fact were proved it could have no legal effect. And then follow two or three sentences quoted by counsel showing that the defense was not set up in the pleading and stating that it was not necessary in that case to inquire whether it ought to have been.

But if we could infer that the court were of opinion that the illegality should have been pleaded, it would be because the transaction (i. e., the deed) on its face was innocent and valid, and some one must perforce bring to the attention of the court the facts showing it to have been tainted.

We respectfully submit that the judgment of the Supreme Court of Ohio should be reversed.

LEDYARD LINCOLN,
JULIUS L. ANDERSON,
Of Counsel.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 174.

Office Supreme Court U. S.
FILED
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JAMES H. MCKENNEY,
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THE CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. BAY AND WILLIAM BAY, DEFENDANTS IN ERROR.

Reply Brief for Plaintiff in Error.

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ERROR TO THE SUPREME COURT OF OHIO.

Reply Brief for Plaintiff in Error.

Before argument the court granted us the privilege of filing a reply brief, and gave us six days for that purpose.

We propose very briefly to reply to two points made in the brief of opposing counsel, namely:

1. That the consideration for the promise sued on was not illegal under the Sherman Act, because it was ancillary to the sale of a business and its good will, or at least of certain steamboats, and would therefore have been sustained at common law.

2. That the record does not show that the Federal question was raised in the proper manner or at the proper time and passed upon by the Supreme Court of Ohio.

I.

The Covenants in Restraint of Commerce Were Not Ancillary.

Whatever the rule may be as to covenants not relating to interstate transportation or *directly* restraining commerce among the States, it would seem clear, as we have argued in our brief, that where the covenant deals directly

with such interstate transportation, and restricts or regulates it, the Sherman Act makes it illegal, even though it may be ancillary to the sale of a business. Mr. Justice Peckham was not speaking of cases where the contract was about interstate transportation, and the Federal cases cited on page 12 of opposing counsel's brief were not of that character.

In the case of *Davis* v. *Booth*, 131 Fed. Rep., cited by counsel, the court say, at page 37:

> "It is possible that it may be developed at the final hearing that interstate traffic may be directly involved in this agreement. But if so, it will be prudent to postpone final decision in respect to the consequences thereof upon the validity of the agreement until the case is presented upon full proof, rather than by *ex parte* affdavits, as now."

The contract provided for the purchase of a fish business and its good will, with an incidental covenant not to engage in like business.

But the covenant sued on in the case at bar was not ancillary to the sale of any business or good will, or to the sale of personal property within the rule of the common law, for several reasons.

(*a*) No business or good will was sold.

(*b*) The $3,600.00 per annum was not part of the purchase price of the steamboats, nor has it ever been claimed to be; therefore the only consideration which can support the promise to pay it is the agreement to stay out of the business. How, then, can the latter agreement be the "mere accompaniment of the sale of property entered into to enhance the price at which the vendor sells it," etc., to use the language of Mr. Justice Peckham in the Trans-Missouri case? A contract to stay out of business, standing alone, though limited as to time or locality, in consideration of a sum of money, was invalid at common law.

(*c*) The $3,600.00 per annum is payable to the Bays,

and not to the vendor of the steamboats. The case of *Nordenfelt* v. *Maxim, etc.* (1894), App. Cas., 535, cited by counsel, was very different. In that case Nordenfelt sold his plant, business, and its good-will to the Nordenfelt Co., organized to carry on the business, and for the same consideration, and, as part of the sale, made a covenant not to compete. He continued to act as managing director of the company, and while so acting and with his concurrence, the Nordenfelt Co. was merged with the Maxim Co., it being part of the agreement of merger that the plant, good-will and accompanying covenant should pass to the new company. Instead, however, of assigning or keeping alive the original covenant, a new covenant was made by Nordenfelt. This was properly treated by the Court of Appeals as a substitute for the original covenant. See opinion of Lord Macnaghten.

(*d*) That the $3,600.00 per annum was not part of the purchase price of the steamboats, or connected therewith, is shown by the fact that, while the $30,000.00 stated as such purchase price is secured by notes and collateral and to be paid in any event, the payment of the annual installments of $3,600.00 are to be deferred in case serious opposition by strangers should arise.

(*e*) In case such opposition should continue for two years, the Bays are given the option of cancelling the agreement and again competing with the Big Sandy Co. In such case the contract provides for a forfeiture of the unpaid installments, but does not contemplate a rescission of the sale of the steamboats belonging to the Portsmouth Co.

(*f*) A provision for the case of opposition by third parties is not such as has ever, so far as we have seen, been held to be ancillary to a sale of property or a business.

See *Tuscaloosa* v. *Williams*, 127 Ala., 110, 119-121.

(*g*) The provision for the maintenance of rates to be established by one of the parties is not properly ancillary to a sale, but looks rather to a continuance of business.

(*h*) There is nothing on the face of the contract showing any intention to make the covenants about competition ancillary to the sale of the steamboats, but its structure and language look to the accomplishment of distinct objects; *i. e.*, a sale of certain property and a parcelling out of the river between the parties, each having a clear field in its part.

II.

The Federal Question Was Raised in a Proper Manner and in Due Time.

The petition and answer set forth sufficient of the provisions of the contract to show its illegality under the Sherman Act, and the defendants in error introduced the contract in evidence at the outset of their case. The petition and the evidence printed in the record both show that the commerce restrained by the contract was commerce betwen the States. The question, therefore, of the illegality of the contract under the Sherman Act appeared from the outset and upon the plaintiff's own showing, and, as such illegality is sufficient to prevent any recovery, the Federal question was, from the outset, vital in the case.

It is claimed that it does not appear in the printed record that the commence restrained was interstate commerce. This claim is clearly unfounded. The petition (Record, page 1) alleges that the Portsmouth Company was, at the time of the making of the contract, and prior thereto, in business as a river transportation company, running certain steamboats "for the carriage of freight and passengers between Cincinnati, Ohio, and Pittsburgh, Pa., by way of Charleston, W. Va." This surely is interstate commerce, and it is a part of this interstate commerce, namely, so much of it as lies between Portsmouth and Cincinnati, Ohio, that was restricted by the contract. The petition further shows that the parties of the first part agreed not to be interested in running or operating any freight or passenger business "at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points, nor

at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points, nor at and from Syracuse, Ohio, and points between Syracuse and Portsmouth to or for points below Portsmouth, Ohio." It is a matter of common knowledge that the points intermediate between Syracuse and Portsmouth and Portsmouth and Cincinnati include many in the States of West Virginia and Kentucky, as, for instance, Huntington, W. Va., Ashland, Vanceburg, Maysville and Augusta, Ky.

The testimony of William Bay, one of the defendants in error (Record, pages 6-16), and of Captain Laidley (Record, pages 22-29), shows the trade between Syracuse and Cincinnati, in which both parties were engaged at and prior to the making of the contract, and about which they were contracting, and discloses the fact that such trade was between the States. We submit the court can look at the printed evidence to see what the commerce was that the parties were contracting about or had in mind when they signed the contract.

As we have said in our original brief, since the State of Kentucky extends to low water mark on the Ohio side, a steamboat plying direct from Portsmouth, Ohio, to Cincinnati must pass through Kentucky.

The motion for a new trial in the Common Pleas Court (Record, page 5) and the petition in error to the Circuit Court (Record, page 32) both assign for error that the judgment of the Court of Common Pleas was "contrary to law." Such an assignment is, under the Ohio practice, sufficient to cover any error of law committed by the trial court and prejudicial to the plaintiff in error, and it is common practice in the courts of Ohio to make such general assignments.

In the case of *Weaver* v. *The Columbus, Shawnee & Hocking Valley Ry. Co.*, 55 Ohio St., 491, at 495, the court speaking of such an assignment, in a motion for a new trial, says:

> "This subdivision (6) of Section 5305, not only authorizes a new trial upon the ground that the

> verdict, etc., is not sustained by sufficient evidence, but in equally explicit terms authorizes a new trial whenever the 'verdict, report or decision' is contrary to law. This ground—that the 'verdict, report or decision' is contrary to law—is broad and comprehensive. It would seem to include any error of law committed by the trial court in the course of a trial, prejudicial to the losing party."

Opposing counsel are therefore mistaken when they assert that the question of the illegality of the contract was not presented to the Circuit Court of Lawrence County by the motion for a new trial, or the petition in error. The Circuit Court of Lawrence County passed upon the Federal question, as will be seen by its opinion (Record, page 40). In the argument in the Supreme Court both sides quoted from or referred to this opinion, and a copy of it was handed to the court on the close of the argument and directed to be filed among the papers of the case. We are at a loss to know how it was not marked "filed" on the day of argument, but it would seem sufficient that it has been returned to this court under the seal of the Supreme Court of Ohio, as one of the files in the case.

Rule 8, Subdivision 2, of this court provides that in all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case. This language does not limit the requirement to opinions delivered by the court whose judgment is sought to be reviewed.

It is, however, admitted that the Federal or jurisdictional question was raised, by the petition in error, to the Supreme Court of Ohio, and the entry of certification made on Dec. 19th by the court (Record, page 39) shows that the Supreme Court did consider and decide the question. This entry of certification expressly recites that it is made a part of the record in the case, "and of the judgment and

entry of affirmance heretofore rendered and made herein." It is, therefore, a part of the judgment of which we complain.

In the Supreme Court of Ohio the judgments are generally drawn by the clerk, and not by counsel, immediately upon the rendering of the decision. But the court has power to make amendments or additions to its judgments at any time within the term.

This court has repeatedly held that if the Federal or jurisdictional question be raised for the first time in the assignments of errors in the Supreme Court of the State, the question is presented in time.

Farmers Ins. Co. v. *Dobney*, 189 U. S., 301.
Land & Water Co. v. *San Jose*, 189 U. S., 179.
Chicago, Burlington & Quincy R. R. v. *Chicago*, 166 U. S., 226, at 231-2.
Rothschild v. *Knight*, 184 U. S., 334, at 339.

In the case of *Furman* v. *Nichol*, 8 Wallace, 44, at 56, this court says:

> "It is urged that the particular provision of the Constitution, which the plaintiff in error say has been violated in its application to their case, ought to be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary implication, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches."

Respectfully submitted,

LEDYARD LINCOLN,
JULIUS L. ANDERSON,
Of Counsel.

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FILED
DEC 15 1906
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

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vs.

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Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE DEFENDANTS IN ERROR.

Printed by JAMES BARCLAY, 105-113 Canal St., Strobridge Building, Cincinnati, Ohio.

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Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action at law in the court of common pleas of Lawrence County, Ohio, by George W. Bay and William Bay, who are the defendants in error in this court, against the plaintiff in error, The Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company to recover $3,600.00 and interest, alleged to be due under a contract. The court of common pleas gave judgment for the plaintiffs for $3,829.80 (Rec. 4), which was affirmed by the circuit court of Lawrence County (Rec. 36) and by the supreme court of Ohio (Rec. 38). The defendant has sued out a writ of error from this court, assigning that the contract sued on is illegal, under the

act of Congress of July 2, 1890, commonly known as the Sherman anti-trust act.

We submit (1) that no federal question is raised by the pleadings, and that the writ of error should be dismissed for want of jurisdiction, and (2) that the contract is not illegal under the act of Congress.

ARGUMENT.

I.

The contract is valid under the laws of Ohio and at common law.

The contract is found at page 30 of the record. Its validity under the laws of Ohio is settled by the decision of the supreme court of the State in this case, in which they doubtless followed their decisions in

Lange vs. Werk, 2 Ohio St. 520.
Thomas vs. Miles, 3 Ohio St. 274.
Morgan vs. Perhamus, 36 Ohio St. 517.
Lufkin Rule Co. vs. Fringeli, 57 Ohio St. 596.

In Lufkin Rule Co. vs. Fringeli, the court held:

"All agreements in general restraint of trade are against public policy and void, but agreements having such partial effect only, made in connection with the purchase of a business and its good will, shown to be reasonably necessary to the enjoyment of the good will of the business purchased, and not oppressive, may be enforced."

The contract is also valid at common law. It was a sale by the Portsmouth & Pomeroy Packet Company of two steamboats and other property to the defendant below for $30,500. It appears from the petition in the court of common pleas that the plaintiffs were the owners of stock in the vendor company, one of them being its superintendent and

treasurer and the other its president, and that they had been engaged in the steamboat business for many years, and had a large acquaintance and good will. They agreed with the vendee company, as an incident of the sale, that they would not, for five years thereafter, "be in any way directly or indirectly engaged in running or operating, or in any way be interested in any freight, or passenger packet business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points, nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points, nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio." It was in consideration of this covenant that the defendant agreed to pay them $3,600 annually in advance for five years from the date of the sale. The first four instalments were paid. The suit was to recover the fifth, due on November 26, 1899.

In Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64, the plaintiff Navigation Company, which was engaged in business in California, sold a steamer to the defendant, which the defendant agreed not to use in the waters of California for a limited time. The court held that the defendant's covenant was not in restraint of trade and void, or rather that the covenant for ten years was unreasonable, but that it would be enforced for seven years.

Mr. Justice Bradley said, at p. 68:

"There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when a contract is general, not to pursue one's trade at

all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid."

To the same effect are—

California Steam Navigation Co. vs. Wright, 6 Cal. 258.

Dunlop vs. Gregory, 10 N. Y. 241.

The subject is considered in Fowle vs. Park, 131 U. S. 88, 97.

In the elaborate opinion of Judge Taft in the court of appeals in United States vs. Addyston Pipe & Steel Co., 85 Fed. 271, at p. 281 et seq., will be found a long list of cases in England and the United States holding that "covenants in partial restraint of trade are generally upheld as valid when they are agreements by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold," followed by a list of cases holding agreements to be illegal in which "the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employe."

Harrison vs. Glucose Sugar Refining Co., 116 Fed. 304 (C. C. A. 7th Circuit), is a later case.

In Fisheries Co. vs. Lennen, 116 Fed. 217, 219, which was affirmed by the court of appeals for the second circuit (130 Fed. 533), the court said:

"In the Trans-Missouri Freight Case, 166 U. S., we find on page 329, that the majority opinion practically sanctions the position now taken by counsel for the complainant; and when connected with the dissenting opinion of Mr. Justice White, where he carefully reviews the law as it is applied in these later days and conditions, to be found on pages 346-352, 166 U. S. page 540, seems to settle absolutely the proposition that contracts in 'restraint of trade' must absolutely, or at least unreasonably, restrain trade, and that the agreement not to engage in a like business for a definite length of time, and within a restricted territory, entered into in aid of or collateral to the main sale of one's property, is a very proper and lawful thing to do, and, indeed, should be favored, because it enables the vendor to obtain the highest possible price for his property."

In Hursen vs. Gavin, 59 Ill. App. 66, affirmed in 162 Ill. 377, it was held that "a contract by which a person for a valid consideration bound himself not to engage in a certain business in the city of Chicago for a term of five years, is within reasonable limitations and may be enforced."

In Hedge vs. Lowe, 47 Iowa, 137, it was held that--

"A contract founded on a good consideration is valid, although in restraint of trade as to a particular person, place and period, as here the sale of a business with a stipulation by the seller not to re-engage therein within the town within five years."

The written contract, taken in connection with the allegations of the petition concerning the plaintiffs' interest in and connection with the business and custom of the selling company, shows that the plaintiffs' covenant not to engage in competing business was ancillary to the sale, and was inserted for the purpose of protecting the vendee in the main clause, and the court will so regard the covenant. In Nordenfelt vs. Max-

im Nordenfelt Guns and Ammunition Company [1894], App. Cas. 535, Nordenfelt sold his stock-in-trade and good-will to the Nordenfelt Company, and became managing director thereof. Subsequently that company and the Maxim Company were consolidated into the plaintiff company, and Nordenfelt agreed not to engage in competition with the plaintiff company. When sued on this covenant he contended that it was in restraint of trade and that it could not be enforced because, when it was signed by him, he had already parted with his business, and that the sale was by the Nordenfelt company and not by him, and that his covenant was therefore not ancillary to the sale of a business by him at that time. The House of Lords dealt with this argument in a summary way, Lord Herschell saying:

"The case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good-will of the appellant's business and with the object of protecting it."

The same view was expressed by all the Lords who delivered opinions.

In S. Jarvis Adams Co. vs. Knapp, 121 Fed. 34 (C. C. A. 6th circuit), the lower court refused to enforce a contract in partial restraint of trade on the ground that "the contract in which the stipulations in question were embodied did not show that any interest was transferred which those stipulations supported." The court of appeals reversed the decree, saying, p. 39:

"We must look to the whole contract and see what was the object and purpose of it, and what relation this particular stipulation bears to its other parts."

In this case it is immaterial whether the separate covenant of the plaintiff in error to "maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio,"

is legal or illegal. The suit is not on that covenant, but on the covenant to pay $3,600. The other covenant is not mentioned in the pleadings.

In Pigot's Case, 11 Coke's Rep. 27 b. it was resolved that if some of the covenants of an indenture or of the conditions endorsed upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void ab initio and the others stand good.

The following statement of the rule in Bank of Australasia vs. Breillat, 6 Moo. P. C. 152, 201, is quoted in all of the text books, to-wit:

"From Pigot's Case, to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal can not."

The rule is recognized in Ohio ex rel. vs. Board of Education, 35 Ohio St. 519, at p. 527.

Harriman on Contracts, 134, states "the generally accepted doctrine" thus:

"Where there is a promise to do two things, one of which is legal and the other illegal, the promise to do the legal act will be enforced and the illegal act will be disregarded."

He adds:

"Under the rule in Pigot's Case, as developed by the modern authorities, it makes no difference whether there be two distinct premises, or whether there be one promise which is divisible."

The latter feature of the rule is illustrated by Lange vs. Werk, 2 Ohio St. 520, where a covenant not to engage in business in the county of Hamilton and state of Ohio, or at any other place in the United States was held divisible and en-

forcible as to the county of Hamilton, although illegal as to the United States generally.

In Thomas vs. Miles, 3 Ohio St. 274, a similar covenant was held divisible and enforcible so far as it was valid, and unenforcible as to the rest.

In Oregon Steam Navigation Company vs. Winsor, 20 Wall. 64, 70, 71, the court, being of opinion that a restrictive covenant for ten years was unreasonable but that seven years was a reasonable period, enforced it for the latter term. Mr. Justice Bradley said:

"It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.'"

The condition of the contract which deferred the time for paying the annual instalments "in case of opposition to the boats of the party of the second part by other boats running from Cincinnati, Ohio, to Portsmouth, Ohio, or from Cincinnati to points above Portsmouth, not including points above Syracuse, Ohio, causing the party of the second part to carry freight and passengers at exceedingly low rates," had no relation to anything the plaintiffs were to do or to refrain from doing, for their covenant was not to engage in the business, nor had it relation to interstate commerce. The points named were all in the state of Ohio.

II.

The contract is not illegal under the Sherman anti-trust act.

It may be conceded that a person, who is engaged in the business of transporting passengers and freight between states, may not contract to stifle competition with another engaged in the same business, but he may withdraw from the business and sell his plant and good-will, and agree incidentally not to re-engage in the business for a reasonable time within a limited area. The act of Congress does not forbid such a contract. If it did, it would be repugnant to the Fifth Amendment, which provides that "no person shall be . . . deprived of life, liberty or property without due process of law."

The anti-trust act does not compel a citizen to stay in interstate business. It only regulates his conduct while engaged in the business.

It does not forbid the owner of property which has been used in interstate commerce from selling it and agreeing, in connection therewith, not to engage in the same business for a limited time.

In United States vs. Joint Traffic Association, 171 U. S. 505, 568, Mr. Justice Peckham said:

"The sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act."

In Anderson vs. United States, 171 U. S. 604, 615, Mr. Justice Peckham, who delivered the opinion of the court on the same day in United States vs. Joint Traffic Association, 171 U. S. 505, said, p. 615:

"Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate com-

merce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In Hopkins vs. United States, 171 U. S. 578, also decided the same day, Mr. Justice Peckham at p. 593, suggests a long list of agreements which might affect interstate commerce indirectly, such as an agreement between builders of cattle cars not to build them under a certain price, thereby increasing the cost of transporting cattle between states, or an agreement among locomotive engineers engaged in the service of interstate railroads, not to work for less than a certain compensation, thereby increasing the cost of interstate traffic. The opinion declares that none of the agreements supposed would be repugnant to the Sherman act.

In Northern Securities vs. United States, 193 U. S. 197, 360, Mr. Justice Brewer, in his concurring opinion says:

"First, let me say that while I was with the majority of the court in the decision in United States vs. Freight Association, 166 U. S. 290, followed by the cases of United States vs. Joint Traffic Association, 171 U. S. 505, Addyston Pipe & Steel Company vs. United States, 175 U.S.211, and Montague & Co. vs. Lowry, 193 U.S.38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments can not be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should

have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

It is doubtless with reference to the foregoing statement of Mr. Justice Brewer, that Mr. Justice Holmes says at p. 411:

"I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the bellum omnium contra omnes and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried."

In Bement vs. National Harrow Co., 186 U. S. 70, the court held that the conditions limiting the terms and price at which the licensee of a patent used in interstate commerce might sell did not make the contract obnoxious to the Sherman anti-trust act. On that point the court said, at p. 92:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from rea-

sonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

In Brett vs. Ebel, 51 N. Y. Supp. 573, plaintiff sued on a contract under which defendant sold to plaintiff all his interest and good-will in the business of transportation between New York and Haiti, and agreed not to engage in transportation in competition with the plaintiff. The court held that the contract was not invalid at common law, nor under the federal anti-trust act. Referring to the decision of this court in United States vs. Joint Traffic Association, the court said:

"The opinion in that case however must be read in the light of the facts. There the restraint was not ancillary to any lawful agreement, the particular contract was one entered into by competing railroads. We find nothing in the opinion to warrant the extreme view taken by defendants here."

A similar construction was given to the act by the circuit court of appeals for the eighth circuit in

Whitwell vs. Continental Tobacco Co. 125 Fed. 454.

Phillips vs. Iola Portland Cement Co. 125 Fed. 593.

The opinion of the court of appeals for the sixth circuit in Davis vs. A. Booth & Company, 131 Fed. 31 (1904), is shown by the following syllabus:

"Where a corporation engaged in the business of buying and selling fish sold out its assets and good-will to plaintiff's assignor, *and the seller no longer retained any interest in the property*, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the federal anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting contracts in restraint of trade, though the contract might incidentally or in some remote degree injuriously affect interstate commerce."

III.

No federal question is raised by the pleadings.

The defendant is sued upon a promise to pay $3,600 in consideration of a promise on the part of the plaintiffs not to engage or be interested for five years, in freight and passenger packet business between certain named points in the State of Ohio, and intermediate points. It does not appear from the pleadings or the contract that the covenant relates to the business of carrying passengers or freight between points in different states. The first allegation of the petition is that the defendant is "engaged in running steamboats on the Ohio river for the carriage of freight and passengers between Cincinnati, Ohio, and Syracuse, Ohio" (Rec. 1), and the answer admits the allegation. Rec. 3. There is not a word about interstate commerce in the petition or in the answer, nor any claim in the answer that the contract is invalid under the act of congress.

The first time that claim was made was in the second petition in error in the supreme court of Ohio (Rec 37), which alleges that the circuit court of Lawrence county "erred in holding and deciding against the claim of the plaintiff in error that the said contract sued upon by the defendants in error was not illegal under the act of congress, entitled 'an act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890, known as the Sherman act,'" and in "holding and deciding against the rights and immunities claimed by the plaintiff in error under said Sherman act" (Rec 37).

No such claim was made in the circuit court of Lawrence county, as will be seen by examining the petition in error filed in that court, Rec. 32. Nor was any such claim noticed in its judgment, Rec. 36. What purports to be the opinion of the circuit court of Lawrence county, printed at page 40, is no part of the record. It was not filed in that court nor

certified by its clerk. It is an unauthenticated paper which was not filed in the supreme court of Ohio, during the pendency of the case there, as the court will see by examining the certified transcript of the docket and journal entries of the court (Rec. 38, 39). The supreme court of Ohio entered its judgment December 13, 1904 (Rec. 38). The only endorsement on the paper is that it was filed there January 19, 1905 (Rec. 44), a month after the mandate of the court was issued to the circuit court of Lawrence county (Rec. 39), and nearly a month after the writ of error from this court was allowed.

The plaintiff in error can not import a federal question into the case in that way, nor by an assignment of error in the supreme court of Ohio not supported by the pleadings, nor by a certificate from that court made six days after the entry of its final judgment that "in the arguments both oral and by brief made in this court on behalf of the plaintiff in error, it was insisted and relied upon by said plaintiff in error that the contract sued upon by the defendants in error was illegal and void under the Act of Congress approved July 2d, 1890, entitled, 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly called the 'Sherman anti-trust act,' as being in illegal restraint of interstate trade and commerce and providing for an illegal combination or conspiracy in restraint of such trade and commerce and for an unlawful monopoly of a part of such trade and commerce within the meaning of said Act of Congress; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to said plaintiff in error as appears in the entry and judgment of affirmance heretofore made herein." Rec. 39.

The judgment of affirmance makes no reference to the point (Rec. 38), and there was no opinion. The jurisdiction of the supreme court of Ohio is confined to the consideration

of questions of law arising upon the record before it and duly preserved by exceptions in the lower courts. The court may have overruled the assignment of error which referred to the act of Congress, on the ground that no such question was raised by the record in the court of common pleas or in the circuit court of Lawrence county, or passed upon by those courts; or that it did not appear by the pleadings that the defendant's promise, for breach of which it had been held liable, related to interstate commerce.

On a petition in error in the supreme court of Ohio to reverse the judgment of a circuit court, affirming the judgment of a court of common pleas, the court is not required to consider objections to the judgment of the common pleas that were not assigned for error in the circuit court.

Pollock vs. Cohen, 32 Ohio St. 514.

Insurance Co. vs. McGookey, 33 Ohio St. 555.

Railway Co. vs. Construction Co. 49 Ohio St. 681.

Railway Co. vs. Construction Co. was an action on a contract in which there was a judgment for the plaintiff in the court of common pleas. In the supreme court the defendant below raised the question of the validity of the contract for the first time. The court said, p. 684:

"The question as to the validity of the agreement between the plaintiff and the defendant for the breach of which the suit below was commenced, was not presented or considered in the common pleas nor in the circuit court; nor, in this court, until a short time before the case was reached for oral argument; and, also, after the plaintiff in error had obtained an order for an abridgement of the printing of the record to such parts of it as raised the questions already considered. In view of these facts, and the established rule of the court not to consider questions unless assigned for error in the courts below, we decline to consider the question as to the validity of this contract; and express no opinion upon it."

The decision of the court is shown by the third official syllabus, to-wit:

"Questions not made in the court of first instance nor assigned for error in the circuit court, will not be considered in this court."

There was no suggestion that the contract was illegal, or even that it involved interstate commerce, in the answer (Rec. 3), or in the motion for a new trial (Rec. 5), or in the petition in error in the circuit court (Rec. 32), or in the first petition in error in the supreme court(Rec. 34); nor is the point referred to in the judgments of the common pleas, the circuit court, or the supreme court, which affirmed the judgment of the circuit court without opinion. 71 Ohio St. 521.

The plaintiff in error has printed extracts from the testimony in the court of common pleas; but a federal question can not be imported into the case in that way. The printed record does not show what the other evidence was, or that the bill of exceptions contained all of the evidence, and there were no exceptions to evidence or requests for rulings.

The issues in the case must be ascertained by the pleadings, and they contain no suggestion of a federal question.

We respectfully submit that the writ of error should be dismissed for want of jurisdiction.

Caro vs. Davidson, 197 U. S. 197.

Fullerton vs. Texas, 196 U. S. 192.

Chicago, Indianapolis & Louisville Railway Company vs. McGuire, 196 U. S. 128.

If the jurisdiction is sustained, we submit that the judgment should be affirmed.

LAWRENCE MAXWELL, Jr.,
JOSEPH S. GRAYDON,
Counsel for the defendants in error.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 174.

THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET COMPANY,
Plaintiff in Error,

vs.

GEORGE W. BAY and WILLIAM BAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE DEFENDANTS IN ERROR IN REPLY.

LAWRENCE MAXWELL, JR.,
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Counsel for the Defendants in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

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THE CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET COMPANY, *Plaintiff in Error*,

vs.

GEORGE W. BAY AND WILLIAM BAY.

Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE DEFENDANTS IN ERROR IN REPLY.

The Supreme Court of Ohio certify that the plaintiff in error in that Court insisted in oral argument and brief that the contract sued on was illegal and void under the Sherman Anti-Trust Act, and that it became material to the determination of the case "to determine said question so made by plaintiff in error, which was determined adversely," etc. (Rec., 45).

There was no opinion and the Court do not state on what ground or for what reason the question was determined adversely. It may have been because the Court were of the opinion that it did not appear from the pleadings, or from the pleadings and the evidence, that the restrictive covenant of the plaintiffs below related to interstate com-

merce. If so, no federal question is presented to this Court.

The restrictive covenant mentioned in the petition *names* only points in the State of Ohio and "intermediate points." There is not a word about interstate commerce, and no averment in any pleading that the "intermediate points" were in another State. The plaintiff in error says that "the *testimony* shows that the intermediate points included a number of points in the State of Kentucky." This concedes that the testimony may have shown the very opposite. The plaintiff in error has printed only a fragment of the testimony, less than one-tenth, as appears by the index. The printed testimony of William Bay does not purport to be all of his testimony. The whole testimony may show that the "intermediate points" referred to in the contract are in the State of Ohio, or the bill of exceptions may not contain all of the evidence, or the Supreme Court of Ohio, in the absence of an averment that "intermediate points" were in Kentucky, may have declined to look at the evidence to determine the question, or they may have examined the evidence and come to the conclusion that the "intermediate points" referred to in the contract were in Ohio.

In neither of the events supposed would a Federal question be presented to this Court. It may be inferred that the Supreme Court of Ohio denied the right claimed under the act of Congress, because the record before them showed that the trade restrained was confined to the State of Ohio. This Court having only a fragment of the evidence before it, cannot say that the Supreme Court of Ohio was wrong in so deciding.

It is next contended that steamboats plying between Portsmouth, Ohio, and Cincinnati, without stopping, are engaged in "trade and commerce between the several states," because they may be compelled to pass above Kentucky soil when the river is low. Hanley vs. Kansas City Southern Railway Co., 187 U. S., 617, is cited. That case decided that a railroad transporting goods on a through bill of lading from one point in Arkansas to another point in Arkansas, by way of Indian Territory, was not bound to

comply with a rate fixed by a board of commissioners of Arkansas, the charter under which the road operated in Indian Territory having reserved to Congress the right to fix rates. The order of the commission was said by this court to be bad as interferring with the power of Congress to regulate commerce. In Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S., 192, it was held that the State of Pennsylvania could tax a railroad company on account of transportation between two points in Pennsylvania by way of New Jersey, there being "no breaking of bulk or transfer of passengers in New Jersey."

Congress has full power to regulate interstate commerce, but by the Sherman act Congress has exercised that power only in so far as restraints are imposed on "trade and commerce between the several States." A contract restraining the sort of transportation in this case, does not amount to a restraint on "trade and commerce between the several states." On this point also the fragmentary state of the record precludes this court from reversing the judgment, because the other evidence in the full record may have shown that the boats actually operated only on the Ohio side of the river.

The Court will not *assume* facts to make the contract illegal; on the contrary the presumption, in the absence of allegation or proof, is in favor of its validity.

In Herpolsheimer vs. Funke, 95 N. W., 687 (Neb.), the Court said:

"It is elementary that if the covenant in question, rightly construed, is in general restraint of trade, and not reasonably limited as to place, it is unenforceable; while on the other hand, if rightly construed, it merely prohibits the one party from engaging in competitive business for a reasonable time, and within a limited area, not larger than is reasonably necessary for the protection of the other, it is valid and enforceable. Mollyneaux vs. Wittenberg, 39 Neb., 547, 58 N. W., 205. It is not less elementary that, if the words used will bear an interpretation adapted to express a lawful purpose, such interpretation will be given them, rather than one which would render the covenant void; and this principle applies to covenants in restraint of trade. Anthony vs. Hitchcock (C. C.), 71 Fed., 659; Hitchcock vs. Anthony, 83 Fed., 780, 28 C. C. A., 78; Curtis vs. Gokey, 68 N. Y., 300, 303; Greenhood on Public Policy, 122."

Jewett Publishing Co. vs. Butler, 159 Mass., 517, involved a contract between General Butler, who intended to write an autobiography, and a publisher, in which General Butler agreed "to accept full responsibility for all matter contained in said work, and to defend at his own cost any suits which may be brought against the publisher for publishing any statement contained in said work, and to pay all costs and damages arising from said suits."

In an action by the publisher against General Butler for breach of contract, he insisted that the contract was illegal, because it showed on its face that it contemplated the publication of scandalous or libellous matter. The Court held that the contract did not necessarily disclose that purpose and that they would not impute to the parties an intention to violate the law.

In Mills vs. Dunham (1891), 1 Ch., 576, in the Court of Appeal, LINDLEY, L. J., said, page 586:

"I think that Mr. Levett's contention that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents."

Respectfully submitted,

LAWRENCE MAXWELL, JR.,
JOSEPH S. GRAYDON,
Counsel for the Defendants in Error.

Supreme Court of the United States.

No. 174.—October Term, 1905.

The Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, Plaintiff in Error, vs. George W. Bay and William Bay.	In Error to the Supreme Court of the State of Ohio.

[January 2, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the State, although the petition in error to that court set up that the contract was illegal under the Act of Congress of July 2, 1890, c. 647, (26 Stat. 209.) No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that Court. Therefore the present writ of error properly was allowed. The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the State Court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest Court of the State. *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301.

The contract was an indenture between the Portsmouth and Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats and five hundred dollars in the stock of the Coney Island Wharf Boat Company, for $30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays $3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the States. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding* v. *Meyler*, 192 U. S. 573. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the Supreme Court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to

do with commerce among the States. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *E. Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the State line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the considera-

tion of his debt and, in that round about way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64. *Bank of Australasia* v. *Breillat*, 6 Moore, P. C., 152, 201. *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.